VOL. II

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 416

THE UNITED STATES OF AMERICA, PETITIONER

vs.

BERTELSEN & PETERSEN ENGINEERING COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 18, 1938
CERTIORARI GRANTED NOVEMBER 21, 1938

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

October Term, 1936.

No. 3243.

UNITED STATES OF AMERICA,

Defendant, Appellant,

v.

BERTELSEN & PETERSEN ENGINEERING CO.,

Plaintiff, Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS, FROM JUDGMENT (SWEENEY, J.) NOVEMBER 30, 1936.

TRANSCRIPT OF RECORD.

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SEWALL KEY,
Special Assistant to the Attorney General,
FRANCIS J. W. FORD,
United States Attorney,
ARTHUR L. MURRAY,
Special Assistant to United States Attorney,
for Appellant.

RAY HENRY,
for Appellee.

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UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

OCTOBER TERM, 1936.

No. 3243.

UNITED STATES OF AMERICA,
DEFENDANT, APPELLANT,

v.

BERTELSEN & PETERSEN ENGINEERING CO.,
PLAINTIFF, APPELLEE.

TRANSCRIPT OF RECORD OF DISTRICT COURT

No. 4146, LAW DOCKET.

BERTELSEN & PETERSEN ENGINEERING CO.,
PLAINTIFF,

v.

UNITED STATES OF AMERICA,
DEFENDANT.

[MEMORANDUM. This cause has been heretofore appealed by Bertelsen & Petersen Engineering Co., plaintiff, to the U. S. Circuit Court of Appeals for the First Circuit from the judgment for the plaintiff, entered December 4, 1931. An appeal record was duly certified by the clerk of the United States District Court and entered in said U. S. Circuit Court of Appeal for the First Circuit at the October Term, 1931, and entitled Bertelsen & Petersen Engineering Co., Plaintiff, Appellant, v. United States of America, Defendant, Appellee, and numbered 2668, to which record reference is hereby made in lieu of an actual incorporation herein. JAMES S. ALLEN, CLERK.]

The Mandate of the United States Circuit Court of Appeals for the First Circuit was received and filed in the clerk's office on the twenty-sixth day of October, A. D. 1932, and the same being understood by the court it was ordered that the same be entered of record and was duly entered at the September Term of this court, A. D. 1932, and is in the words and figures following:

MANDATE.

[Filed October 26, 1932.]

United States of America, ss:

The President of the United States of America,

(L. S.)

To the Honorable the Judges of the District Court of the United States for the District of Massachusetts, Greeting;

Whereas, lately in the District Court of the United States for the District of Massachusetts, before you, or some of you, in a cause numbered and entitled,

No. 4146, Law Docket,

BERTELSEN & PETERSEN ENGINEERING CO.,
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant,

on December 4, 1931, it was considered by the court, the Honorable Elisha H. Brewster, District Judge, sitting, that the said Bertelsen & Petersen Engineering Co., petitioner, recover from the United States of America, defendant, the sum of forty-four and seven one-hundredths dollars ($44.07), without costs.

And whereas said Bertelsen & Petersen Engineering Company, Plaintiff, appealed from said judgment to this United States Circuit Court of Appeals for the First Circuit, as by inspection of the transcript of the record in said cause of the said District Court, which was brought into the United States Circuit Court of Appeals for the First Circuit, by virtue of the aforesaid appeal, agreeably to the act of Congress, in such cases made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and thirty-one, the said cause came to be heard before the said Circuit Court of Appeals, on the said transcript of record, and was argued by counsel:

On consideration whereof, It is now, to wit, August 2, 1932, here ordered, adjudged and decreed as follows: The judgment of the District Court is vacated, and the case is remanded to that court for further proceedings not inconsistent with the opinion passed down this day.

A certified copy of the Opinion of this Court accompanies this mandate.

You, therefore, are hereby commanded that such further proceedings be had in said cause in conformity with the Judgment and Opinion of this court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness, the Honorable Charles Evans Hughes, Chief Justice of the United States, the twenty-fifth day of October, in the year of our Lord one thousand nine hundred and thirty-two.

ARTHUR I. CHARRON,

Clerk of the United States Circuit Court of Appeals for the First Circuit.

CERTIFIED COPY OF OPINION OF THE U. S. CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

August 2, 1932.

[Accompanying Mandate]

Before Bingham, Wilson and Morton, JJ.

Morton, J. This is an action to recover $34,555.68 with interest, constituting part of an admitted over-payment by the plaintiff on its income taxes for 1917. The plaintiff's total over-payment for that year amounted to $91,570.34. For the next year, 1918, the government assessed on the plaintiff an additional tax in the amount now sued for, and collected it by applying a credit from the over-payment of the preceding year. The plaintiff objected to this, on the ground that the additional assessment was barred by the statute of limitations. It was admittedly made after the expiration of the statutory period; but the government contended that the time had been so extended by waivers given by the plaintiff as to include the date, July 1926, on which the additional assessment was made. The plaintiff denied that the waivers given had that effect. The District Judge resolved this question of fact and law against the plaintiff. An incidental, though not unimportant, question of interest was also involved which the District Judge decided in favor of the government.

The plaintiff's return of its 1918 income tax was filed on 16 June 1919. The five-year period within which additional assessments for that year could be made expired on 16 June 1924. The taxpayer signed four waivers purporting to extend this period. The first waiver was dated 8 January 1924; it said, "This waiver is in effect for one year from the date it is signed by the tax-payer," *i. e.* it extended the time to 8 January 1925. It covered only the 1918 tax. The second waiver was dated 23 February 1924; it extended the time for "one year after the expiration of the statutory period of

limitation, or the statutory period of limitation as extended by any waivers already on file with the Bureau." It covered not only the year 1918, but also the year 1917. By tacking it to the preceding waiver, it carried the time within which an additional assessment for 1918 could be made up to 8 January 1926. The third waiver was dated 27 February 1924; it was "for the years 1918 (1917 extended)." It covered the period "for one year from the date it is signed by the taxpayer," *i. e.* to 27 February 1925. On the face of the papers it effected nothing; it is obviously inconsistent with the preceding waiver. The fourth and last waiver was dated 30 October 1924. It covered only the year 1918, and extended the time "one year after the expiration of the statutory period of limitation, . . . or the statutory period of limitation as extended by section 277 (b) of the Revenue Act of 1924, or by any waivers already on file with the Bureau."

By tacking the last waiver to the second waiver, and tacking the second to the first, the time was extended to January 1927. It will be observed that the first three waivers were given within a period of less than two months in January and February 1924,—two of them within the space of four days,—and that these two were inconsistent, the later being of no effect if the earlier be taken according to its terms.

In this situation the plaintiff offered to show by extrinsic evidence that the second waiver was sent in order that the year 1917, which was not mentioned in the first waiver, might also be covered; that this second waiver was not on the usual form, and the third waiver was made out on the standard form, and was intended to correct the informality in the second and to be in substitution for it; that the last waiver was given on the assumption that the second had been so displaced. This evidence was excluded by the District Judge, and the petitioner excepted.

We are of opinion that the evidence should have been received. The basic purpose of judicial proceedings is to dis-

cover the true facts and having done so to give judgment as is right upon them. Arbitrary rules of law should not be pressed beyond what necessity requires. The parole evidence rule, as applied to contracts, rests on estoppel, *i. e.* that a party having put his agreement with the other party into writing will not be heard to vary or contradict the written instrument. *Central Coal & Coke Co.* v. *Good*, 120 Fed. 793, 798, cited with approval in *Miller* v. *Robertson*, 266 U. S. 243 at 255. A waiver,—which has been defined as "the intentional relinquishment of a known right" (218 Mass. 29),—is not a contract (*Stange* v. *United States*, 282 U. S. 270), and it is doubtful how far the parole evidence rule applies to such writings. *Olmstead* v. *Mansir*, 10 Allen 424. Even as to contracts the rule has never been so rigidly applied as to prevent showing the real nature of the transaction (*Brick* v. *Brick*, 98 U. S. 514; *Mobile & Montgomery Ry.* v. *Jurey*, 111 U. S. 584, 591); nor, as between inconsistent instruments, which one the parties intended should be effective. In *Payson* v. *Lamson*, 134 Mass. 593, a mortgage was conditioned on the payment of certain notes with 6 percent interest; the *notes* were drawn without interest. It was held that the plaintiff might show that, by the understanding of the parties, the notes were to carry interest as stated in the mortgage.

In the opinion the court said: "Where two papers are executed at the same time, relating to the same contract or transaction, both may be looked at for the purpose of showing what the actual contract or transaction was. If, on examination, it appears that they are in some respects inconsistent, as, for example, if a contract is executed in duplicate and the two parts which ought to be alike are found to be different, or if a mortgage does not correspond with the note which it was intended to secure, it is apparent that the inconsistency must have occurred through some mistake or accident. It certainly is not to be supposed that the parties have understandingly intended to execute and deliver, as parts of the

same transaction, papers which are inconsistent with themselves; and if it appears that they have done so, it is natural and reasonable to infer that one of the papers was so executed and delivered by mistake. In such case, it not being apparent on the face of the papers which one expresses the real intention and agreement of the parties, there is no good reason why extrinsic evidence should not be received in a court of law to show the fact. Each paper may be put in evidence, as an admission or declaration of whatever is therein contained. An argument may also be drawn from the circumstances of any particular case, that one of the papers would be more likely to express the true meaning of the parties than the other. But there is no legal presumption to that effect. There being, then, two inconsistent writings, both admissible as evidence of the transaction to which both relate, and there being no legal presumption in favor of either, but it being a question of fact which correctly represents the agreement of the parties, we should be slow to admit that a court of law, encountering such a state of facts, would be powerless to deal with it, and unable to consider other evidence to show which paper was delivered understandingly, and which through mistake. On the contrary, we are of opinion that, on the trial of the action at law, it would be entirely competent for the present defendants, on the one hand, to show by extrinsic evidence that the notes expressed the real understanding and agreement of the parties; or for the present plaintiffs, on the other hand, to show in like manner that the mortgage expressed such understanding and agreement."

These observations of a very able judge apply with force to the case before us. Part of the period of extension as claimed by the defendant is covered by four separate waivers, all of the same general character, each given by the plaintiff and accepted by the government. There was no apparent reason for such duplication. As has been said, the waiver of February 27 covers no period, if the government's contention

be accepted, which was not already covered by that of February 23. On the face of the papers a probability of mutual mistake appears which, even if they be regarded as contracts, opened the door to extrinsic evidence to prove the real understanding of the parties, as to which of the overlapping inconsistent instruments was relied on. Moreover, it is always open to show by parole evidence that a written agreement, not involving matters required to be in writing, was subsequently abandoned or rescinded by parole. *Bradford* v. *Union Bank*, 13 How. 57 at 66. *Thomas* v. *Barnes*, 156 Mass. 581.

As to interest: What has been decided is sufficient to dispose of this appeal. But as questions of interest are likely to arise, in one form or another, on the new trail, they ought to be determined. Interest against the government is only allowable as provided by statute. *Angarica* v. *Bayard*, 127 U. S. 251, 260; *Boston Sand & Gravel Co.* v. *United States*, 278 U. S. 41. There is no fixed right to it. It depends on the law at the time when the claim is allowed by the department or, if the claim is litigated, when the case is heard by the court. *Hind* v. *United States*, 41 Fed. 2d, 892 (Ct. of Claims).

The plaintiff contends that if the additional assessment of $34,555.68 was valid it should be regarded as having been made under the Act of 1926, and the credit should, therefore, carry interest to the date of the assessment (July, 1926), instead of to the due date of the tax against which it was taken. (Revenue Act of 1926 sec. 1116.) For the reasons stated in *Riverside Cotton Mills* v. *United States*, 37 Fed. 2d, 965 (Ct. of Claims), with which we agree, the District Judge correctly ruled that the assessment was made under the Act of 1918, and that the government's computation of interest was in this respect right.

The plaintiff further contends that it was entitled to interest on the amount actually refunded, not merely to the date of the allowance of the refund (July 1926), but to the

date of payment of it (October 1927). This payment was made without suit. The Act of 1926, section 1116, in force when the refund was made, contained explicit provisions as to interest on such refunds. It is controlling. The plaintiff's claim in this respect was properly disallowed.

It follows that, if the additional assessment of $34,555.68 was legally made, the rulings of the trial judge on interest were correct. No question is made as to the slight error in dates which he noticed and corrected.

If the additional assessment was not legally made, then as this sum will be recovered by suit in court, interest on it will be governed, not by the Act of 1926, nor by any provisions as to interest on *credits*, but by the current act governing interest on claims against the government collected through judgment *of a court*, viz., section 319 of the act making appropriations for the legislative branch of the government and for other purposes approved June 30, 1932. We think this act sufficiently broad in its language to include all pending cases.

The judgment of the District Court is vacated, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

[SEAL]
true copy.
Attest:

ARTHUR I. CHARRON,
Clerk.

This cause was thence continued from term to term to the June Term, A. D. 1934, when, to wit, August 6, 1934, the following motion to amend answer was filed by the defendant:

MOTION TO AMEND ANSWER.

[Filed August 6, 1934.]

Now comes the respondent in the above-entitled action and moves to amend its answer to the amended petition as follows:

The respondent, not waiving its motion to amend its answer, filed on January 15, 1931, and allowed on said date, and its answer to the amended petition filed on February 16, 1931, but expressly embodying herein by reference all facts alleged in said motion (including the exhibits attached thereto) and in said answer, further answers the amended petition as follows:

And further answering the respondent says that on December 10, 1925, the petitioner filed a waiver extending the statutory period for the assessment and collection of taxes for the year 1918 until December 31, 1926. A certified copy of said waiver is attached hereto, marked "Exhibit F" and by reference made a part hereof.

FRANCIS J. W. FORD,
United States Attorney.

By J. Duke Smith,
Special Assistant to the
United States Attorney.

UNITED STATES OF AMERICA,

TREASURY DEPARTMENT
WASHINGTON

December 8, 1930.

Pursuant to the provisions of Section 661, Chapter 17, Title 28 of the United States Code (Section 882 of the Revised Statutes of the United States), I hereby certify that the annexed is a true copy of Income and Profits Tax Waiver for 1918, dated December 10, 1925, filed by Bertelsen and Petersen Engineering Company, East Boston, Massachusetts, filed in this Department.
[SEAL]

Exhibit F.

IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury:
F. A. BIRGFELD,
Chief Clerk, Treasury Department.

H.C.C. RMS WWB AMR RES CMC B

Form 66—Revised November, 1929—Treasury Department, Chief Clerk and Superintendent. U. S. Government Printing Office: 1929 2—8615

Treasury Department
Internal Revenue Service
Form 672A

4146 Law
Defts Ex A
JEG Jr.
6/3/36

Stamped on face:
Received Dec 21 1925
Special Assessment Section

INCOME AND PROFITS TAX WAIVER

For Taxable Years Ended Prior to January 1, 1922

IT:E:SM
SBD:A—5983 5

December 10th, 1925.

In pursuance of the provisions of existing Internal Revenue Laws Bertelsen and Petersen Engineering Co., a taxpayer of East Boston, Mass., and the Commissioner of Internal Revenue hereby waive the time prescribed by law for making any assessment of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the year 1918, under existing revenue acts, or under prior revenue acts.

This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1926, and shall then expire except that if a notice of a deficiency in the tax is sent to said taxpayer by registered mail before said date and (1) no appeal is filed therefrom with the United States Board of Tax Appeals then said date shall be extended sixty days, or (2) if an appeal is filed with said Board then said date shall be extended by the number of days between the date of mailing of said notice of deficiency and the date of final decision by said Board.

BERTELSEN & PETERSEN ENG. CO.,
Taxpayer.

[Seal]

By Paul J. Bertelsen,
Commissioner.

If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed.

This cause was thence continued to the September Term, A. D. 1934, when, to wit, December 3, 1934, said cause came on for hearing on the aforementioned motion to amend answer, the Honorable Hugh D. McLellan, District Judge, sitting, and it was ordered by the court that said motion to amend answer be allowed.

The cause was thence continued to the December Term, A. D. 1935, when, to wit, January 3, 1936, said cause was set down for trial without a jury, after Mandate, on the pleadings and evidence, and was heard in part by the court, the Honorable George C. Sweeney, District Judge, sitting, findings and rulings to be filed later.

On the said 3rd day of January, A. D. 1936, the following defendant's motion for judgment was filed:

DEFENDANT'S MOTION FOR JUDGMENT.

[Filed January 3, 1936.]

Now comes the respondent in the above-entitled action and on the pleadings and the evidence herein moves that any judgment to be entered for the petitioner be limited to Forty-four Dollars and Seven Cents ($44.07).

By its Attorneys,

FRANCIS J. W. FORD,
United States Attorney.

By: J. Duke Smith,
Special Assistant to the United States Attorney.

Said cause was thence continued to the March Term, A. D. 1936, when, to wit, April 22, 1936, trial was resumed before the Honorable George C. Sweeney, District Judge, sitting as aforesaid, and it was ordered by the court that the defendant's motion for judgment be denied, exceptions being saved, and that judgment be entered for the plaintiff for thirty-four thousand five hundred fifty-five dollars and sixty-eight cents ($34,555.68), with interest at 6% from August 8, 1919.

On the said 22nd day of April, A. D. 1936, an opinion of the court was announced.

This cause was thence continued from term to term to the June Term, A. D. 1936, when to wit, June 24, 1936, a defendant's bill of exceptions was filed within extended time and assented to.

Said cause was thence continued to the present September Term, A. D. 1936, when, to wit, October 20, 1936, the defendant's bill of exceptions is allowed by the court.

On the said 20th day of October, A. D. 1936, the following stipulation with respect to interest is filed and approved:

STIPULATION WITH RESPECT TO INTEREST UNDER OPINION OF COURT DATED APRIL 22, 1936.

[Filed and approved October 20, 1936.]

It is hereby stipulated by the parties in the above-named action that based upon the opinion of the Court, dated April 22, 1936, in which it was held that judgment is given for the petitioner in the amount of $34,555.68, interest should be computed on $28,045.14 of the amount, from August 8, 1919, and on the balance of $6,510.54, interest should be computed

from October 14, 1920, the total amount of the interest to be computed in accordance with the statutes applicable thereto.

RAY HENRY,
Attorney for the Petitioner.

FRANCIS J. W. FORD,
United States Attorney.

By ARTHUR L. MURRAY,
Special Assistant to the United States Attorney.

Approved
G. C. Sweeney
10-20-36

On the 30th day of November, A. D. 1936, it is considered by the court, the Honorable George C. Sweeney, District Judge, sitting, on the finding of the court, that the said Bertelsen & Petersen Engineering Company, plaintiff, recover of the said United States of America, defendant, the sum of thirty-four thousand five hundred fifty-five dollars and sixty-eight cents ($34,555.68), together with interest on twenty-eight thousand forty-five dollars and fourteen cents ($28,045.14) of the amount from August 8, 1919, and on the balance of six thousand five hundred ten dollars and fifty-four cents ($6,510.54) from October 14, 1920, according to law.

From the foregoing judgment, a petition for appeal to the United States Circuit Court of Appeals for the First Circuit was filed by the defendant on February 18, 1937, and was allowed by the court on the same day.

OPINION.

April 22, 1936.

SWEENEY, J. This is an action at law to recover $34,555.68, with interest, constituting a part of an admitted overpayment by the plaintiff on its income taxes for 1917. For the year 1918, the Government assessed a deficiency tax against the taxpayer, and collected it by deduction from the amount overpaid in the previous year. The question before this Court is whether the deficiency assessment for the year 1918 was barred by the statute of limitations as extended by waivers filed by the taxpayer. At a previous trial of this case the District Court Judge excluded evidence offered by the plaintiff for the purpose of explaining the duplication and inconsistency in certain waivers filed by the plaintiff. On appeal the Circuit Court sustained the plaintiff's contention that the Judge had erred in excluding this parole evidence, and the case was remanded to this Court for further proceedings not inconsistent with its opinion. *Bertelsen & Petersen Engineering Company* v. *United States of America*, 60 Fed. (2nd) 745.

Findings of Fact.

The facts regarding the filing of the waivers are as follows: The five-year period during which additional assessment for the year 1918 might have been made expired June 16, 1924. The taxpayer signed five waivers purporting to extend this period.

When this case was before the Circuit Court of Appeals there were but four waivers involved. After the case was remanded, a motion of the defendant to amend its answer so as to set up a fifth waiver was allowed.

Chronologically, the waivers were as follows: The first waiver was dated January 8, 1924, and covered only the 1918

tax. It extended the time to January 8, 1925. The second waiver was dated February 23, 1924, and covered the years 1917 and 1918, and was intended to be substituted for, and not to extend the waiver signed on January 8, 1924. The reason for filing this waiver was to include in the same waiver the returns for the years 1917 and 1918, because the plaintiff wished the period of both returns to expire on the same date inasmuch as both it and the Government had treated the 1917 and 1918 returns together. So far as the waiver filed on January 8, 1924 and the waiver filed on February 23, 1924 were concerned, I find that it was intended by both parties that the period of limitation would be extended to February 28, 1925. A third waiver was dated February 27, 1924 which covered both the 1917 and 1918 returns, and was intended to extend the period of limitation one year from the date of its signature. This waiver was filed by the plaintiff because it had noted the possibility of a misunderstanding of the two waivers filed on January 8th and February 23, 1924, and to eliminate any suggestion that it intended to extend the limitation period of the 1918 return for two years. It was for the purpose of clarifying the two that had been previously filed, and supports the contention of the plaintiff that it never intended that there would be a "tacking" of the various waivers for in the third waiver it specified that the date was extended "for one year from the date it is signed by the taxpayer."

Before passing to the fourth waiver, it is to be noted that the plaintiff received a letter from the government under date of October 25, 1924 requesting that a fourth waiver be signed "in view of the early expiration of the waivers at present on file from your corporation for the years 1917 and 1918." This is consistent with the plaintiff's contention that the third waiver was intended to be substituted for the previous two waivers, and it is apparent from the Government's letter of October 25, 1924 that it so understood. I find that

the third waiver serves to extend the limitation period to February 27, 1925 only.

A fourth waiver was filed on October 30, 1924, covering only the year 1918, and extended the time "one year after the expiration of the statutory period of limitations • • • as extended • • • by any waivers already on file with the Bureau." It is perfectly obvious that on October 25, 1924 the Government treated the three waivers then filed as expiring at an early date, and called the attention of the taxpayer to the fact that the waivers were about to expire. If the theory of "tacking" urged at this time was in existence then, the Government would not have had an occasion to call for the new and fourth waiver, and there would not have been "an early expiration date."

On the receipt of the Government's letter of October 25, 1924, the plaintiff checked the dates on the previous waivers, and, believing that the limitation period as extended by it was to expire on February 27, 1925, executed the fourth waiver intending to extend the period "one year after the expiration of the statutory period of limitations • • • as extended • • • by any waivers already on file" which would bring it in the light of the foregoing to February 27, 1926.

There was no evidence offered by the Government to controvert the contention of the plaintiff, and, as a matter of fact, the plaintiff's witnesses were not cross-examined with relation to the four waivers referred to above. Government counsel addressed themselves entirely to the fifth waiver upon which great reliance is placed. I find, so far as the four waivers are concerned, that the statutory period of limitations was extended only to February 27, 1926, and that, unless the fifth waiver hereinafter discussed constituted a valid extension of the period of limitations to a date beyond the date of the assessment which was July 27, 1926, the plaintiff is entitled to recover.

On July 27, 1926, a deficiency assessment of $34,555.68

was made against this plaintiff; notice of this assessment was not actually communicated to the plaintiff until October 11, 1927.

The facts surrounding the fifth waiver are as follows: On December 5, 1925, the Government wrote to the plaintiff suggesting that "the statutory period as extended *by the waiver* (underlining ours) now on file" was about to expire, and asked for the execution of another waiver extending the statutory limitation to December 31, 1926. It is obvious that at this time the Government was not considering the theory of "tacking" the four waivers previously filed with it, since it referred to but one waiver, and it pointed out that the waiver would expire presently. This supports the finding of this Court as to the intent of the parties respecting the four waivers.

There was no evidence that the plaintiff ever replied to the Government's letter of December 5, 1925 requesting the signature of the fifth waiver. However, the waiver was executed by the plaintiff on December 10, 1925, and was received in the Special Assessment Section of the Treasury Department on December 21, 1925. The eleven-day delay between the date of execution and the date of its receipt by the Government is explained by the following facts: On the receipt of the Government's letter of December 5, 1925, asking for the fifth waiver, the plaintiff executed the waiver, but instead of returning it to the Government, forwarded it to the plaintiff's tax consultant in New York with instructions to determine the desirability of filing the waiver, and with directions not to file the waiver without specific author[illegible] from the plaintiff. The New York tax consultant received the waiver with the instructions from the plaintiff as set forth above, and he, in turn, forwarded the waiver to his Washington tax associate with the same instructions. In disregard of these instructions from his New York associate, the Washington tax consultant of the plaintiff filed the waiver, and did so

without authority from the plaintiff who had never reached a decision to file the fifth waiver. The plaintiff contends that the actual filing does not constitute a valid waiver of the limitation period since it was filed without the plaintiff's authority and consent. It further contends that the fifth waiver is invalid, first, because it was not signed by the Commissioner, and secondly, that if signed by the Commissioner such signature was not effective to validate the waiver because it was signed after the expiration of the limitation period as extended by the fourth waiver.

Conclusions

Considering first whether there has been a sufficient compliance with section 278 (c) of the Revenue Act of 1924, which provides as follows: "Where both the Commissioner, and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment, the tax may be assessed at any time prior to the expiration of the period agreed upon". In the case of *Stearns Co.* v. *United States*, 291 U. S. 54, it was held that the waiver itself need not be signed by the Commissioner, but that a notation on an assessment list attached to the certificate of additional assessments signed by the Commissioner was effective compliance with the statute. In the Stearns case, there appeared on the assessment list attached to the certificate and opposite the item effecting the petitioner the words and figures as follows:

"7 31 17 Fisc. 1753361. O. L. 4/17/23; waiver."

There were but two waivers filed in the Stearns case; the first of which had been signed by the Commissioner, and by reference to the symbols above noted, it could be ascertained that the notation referred to the second or unsigned waiver. Having been able to trace the connection between the entry on

the assessment list, and the waiver to which it referred, the court held that this was satisfactory compliance with the statute which called for the consent of the Commissioner in writing.

In the instant case, on July 27, 1926 an assessment certificate was signed by the Commissioner which was attached to the assessment list, and following the item referring to the petitioner there appeared on the assessment list the following:

"Remarks 1918 403152 R.A.R. waiver O. L. 1/23/26."

Under the theory laid down in the Stearns case, if these notations can be construed as referring to the fifth waiver, then the Commissioner has complied with the statute if the notation were made at the proper time. For the purpose of connecting this entry, the Government produced as a witness the chief of the Additional Assessments and Records Subsection of the Internal Revenue Bureau, who had charge of preparing the Commissioner's additional assessment list on which the entry here involved appeared. The most that can be gathered from his testimony was that the list was prepared in the first instance by an Elliot-Fisher operator; that it was then checked to determine whether a valid waiver was on file or the statute of limitations had not been waived; that those whose initials appeared on the list indicated by their signing their initials that they were satisfied that valid waiver was on file. However, I am unable to conclude that any of the examining officials referred to the fifth waiver. Whether the entry of the word "waiver" on the additional assessment list was made in the mistaken belief that the fifth waiver was signed or under the theory now advanced by the plaintiff that the four previous waivers had not expired either by virtue of their own limitation, or under a theory of "tacking" has not been proven. No part of the entry on the assessment list is helpful to ascertain to which waiver the notation on the assessment list referred, and from the evidence before me

I am not satisfied that it refers to the fifth waiver. I, therefore, reach the conclusion that the Commissioner never consented in writing to the extension purported to be given by the fifth waiver, and that the fifth waiver is ineffective to extend the period of limitations. *Commissioner of Internal Revenue* v. *U. S. Refractories Corporation,* 64 Fed. (2nd) 69. Affirmed 290 U. S. 591.

Another objection to the validity of the fifth waiver is that the signature of the Commissioner if it could be deemed a proper compliance with the statute was not made within the life of the fourth waiver. Section 1106 (a) of the Revenue Act of 1926 provided that:

> "The bar of the statute of limitations against the United States in respect to any Internal Revenue tax shall not only operate to bar the remedy but shall extinguish the liability; • • • ".

Since the limitation period as extended by the waivers expired on February 27, 1926, the liability also ceased on that date. The greatest extension of the limitation period under sections 283 (c) of the Revenue Act of 1926 and section 277 (b) of the Revenue Act of 1924 would be to June 26, 1926. Even if the notation on the additional assessment list could be considered a proper compliance with the statute governing the consent of the Commissioner, nevertheless, it must have been exercised before June 26, 1926, or the liability was extinguished.

The subsequent repeal of this section by the Revenue Act of 1928, 45 Statutes 874, did not revive a dead liability or create a new obligation. *Dobbins* v. *Commissioner of Internal Revenue,* 31 Fed. (2nd) 935. Neither could the subsequent signing of the waiver, if it could be deemed such, serve to revive a liability that was clearly extinguished on June 26, 1926.

It seems unnecessary to consider the contention of the plaintiff that the fifth waiver was filed without its consent or authority, as I am of the opinion that the case is disposed of on the other grounds set forth in this opinion.

The respondent's motion for judgment is denied. Judgment is given for the petitioner in the amount of $34,555.68 with interest to be agreed upon between the parties hereto or by a subsequent determination by this Court if they are unable to agree; to be computed under 28 USCA § 284 (b).

DEFENDANT'S BILL OF EXCEPTIONS.

[Filed June 24, 1936; allowed October 20, 1936.]

This is an action at law by Bertelsen & Petersen Engineering Company, a Massachusetts corporation, against the United States, to recover $34,555.68, with interest, representing a portion of an overpayment of said corporation's income taxes for the year 1917 which was retained by the Government to cover an assessment made against said corporation for a deficiency in income taxes for the year 1918. The case was originally tried before Brewster J., on February 16, 1931, who on April 6, 1931, handed down an opinion ordering judgment for the petitioner in the amount of $44.07. Judgment was entered for this amount on December 4, 1931. The petitioner appealed to the Circuit Court of Appeals for the First Circuit which, on April 2, 1932, vacated the judgment of the District Court and remanded the case to that Court "for further proceedings not inconsistent with this opinion," 60 Fed. (2nd) 745. On August 16, 1934, the respondent filed a motion to amend answer to petitioner's petition, which motion included an amendment to said answer, as follows:

> Now comes the respondent in the above-entitled action and moves to amend its answer to the amended petition as follows:

The respondent, not waiving its motion to amend its answer, filed on January 15, 1931, and allowed on said date, and its answer to the amended petition filed on February 16, 1931, but expressly embodying herein by reference all facts alleged in said motion (including the exhibits attached thereto) and in said answer, further answers the amended petition as follows:

And further answering the respondent says that on December 10, 1925, the petitioner filed a waiver extending the statutory period for the assessment and collection of taxes for the year 1918 until December 31, 1926. A certified copy of said waiver is attached hereto, marked "Exhibit F" and by reference made a part hereof.

Said motion to amend answer was allowed on December 3, 1934. The case was again tried before Sweeney J., on January 3, 1936, on the transcript of record of the District Court, in the Circuit Courts of Appeals, which included all pleadings in the case up to the date of the original trial; the pleadings filed subsequent to April 2, 1932, the date of the opinion of the Circuit Court of Appeals for the First Circuit; certain documentary evidence introduced by the respondent during the trial January 3, 1936, marked respondent's exhibits A, B and C; and certain oral evidence. The transcript of record of the District Court, in the Circuit Court of Appeals for the First Circuit, which included all pleadings in the case up to the date of the original trial, which transcript was introduced during the trial of January 3, 1936, and marked petitioner's exhibit 1; the pleadings filed subsequent to April 2, 1932, the date of the opinion of the Circuit Court of Appeals for the First Circuit; and the documentary evidence submitted by the respondent during the course of the trial of January 3, 1936, and marked respondent's exhibits A, B and C are ex-

pressly incorporated herein and made a part hereof by reference, as if the same were set out herein in full, and may be referred to as a part of this bill of exceptions.

Paul J. Bertelsen, called as a witness by and on behalf of the petitioner, after being sworn, testified as follows:

Direct Examination.

I live at Boston, Massachusetts. I am now in the distillery business. I was vice-president of the Bertelsen & Petersen Engineering Company on January 8, 1924, and continued as such for some time there after. I recall that the first waiver applicable to the year 1918 was filed January 8, 1924. On February 23, 1924, we filed the second waiver. On February 27, 1924, the third waiver was filed. On October 30, 1924, the fourth waiver was filed. The waiver of January 8, 1924, referred to the year 1918; the waivers of February 23, 1924, and February 27, 1924, referred to the years 1917 and 1918, while the waiver of October 30, 1924, only referred to the year 1918. The first waiver was filed in the ordinary course of business at the request of the Government for extension of the time of assessment and collection of the 1918 tax. We had previously filed an unrestricted waiver for the year 1917 which, under the ruling of the Bureau as we understood it, was to expire April 1, 1924; consequently, we received a letter requesting a new waiver for the year 1917. In response to that letter we sent the waiver of February 23, 1924. The purpose in sending that waiver was to include only the year 1917. There was no request for any extension of the year 1918 and no necessity for any extension for the year 1917, as that had already been covered by the waiver of January 8, 1924. The year 1918 was included in the waiver of February 23, because the years 1917 and 1918 had always been considered together both by ourselves and the Bureau, and we wished to include the two years in the same documents so they

would both expire at the same time. The request for the waiver of 1917 came after January 8, 1924. The year 1918 was included in the waiver of February 23, because we decided to have both years covered by one waiver. We intended to have the waiver of January 8, 1924, supplanted and did not intend to give a further year's extension.

At this juncture the Government objected to further interrogation relative to intention without showing that such intention was communicated to anyone in the Bureau of Internal Revenue.

By the Court. I understand the matter is back here on the question intent. "Proceed."

The Witness. Immediately following the sending of the second waiver of February 23, 1924, we noticed that the language of the second waiver differed from the language of the first waiver, and after conference with our tax consultant we decided that there might be some misunderstanding, that we might in effect have extended the time unnecessarily for two years for 1918. In order to definitely pin the separation date to a definite date we immediately, four days after the filing of the second waiver, sent the third waiver, which was limited to one year from its date, and which covered both years. In including the year 1918 at no time did we intend to extend the time within which the assessment might be made more than one year. There was no intention that one waiver should be tacked onto the other and give additional time within which the tax might be assessed. The waiver of October 30, 1924, was sent at the Government's request. We received a letter from the Government requesting that waiver and checked the dates, and believing that the waiver of February 27 was controlling and would presently expire, as the Government stated in its letter, we forwarded the fourth waiver, which was for one year or such further time as extended by the statute and the other waivers on file.

Cross Examination.

The witness was directed to examine petitioner's Exhibit 9 of the transcript of the record on appeal (marked Plaintiff's Exhibit I), part of which was read into the record as follows (p. 8):

> "However, the statutory period as extended by the waiver now on file, within which the Commissioner may assess additional taxes for the year 1918, will expire presently and in order to avoid the necessity of making an assessment prior to such consideration, it is requested that you sign and return to this office within ten days from the date of this letter the enclosed waiver for the year 1918, by which you will note that you agree to an extension of time within which additional taxes may be assessed, if any are found to be due, to December 31, 1926, except as provided in the form of waiver."

Pursuant to that letter we filed the waiver as requested in the Government's letter and transmitted it to our tax consultant at New York, with instructions to investigate the necessity for filing that waiver and not to file it without further authority from us.

The Court. Does that refer to the fifth waiver that you have here?

Mr. Smith. That refers to the fifth waiver. Yes, Sir.

The Witness. We did not intend one waiver should take the place of the other. We had been notified by our tax consultant that it was impossible to withdraw any of these waivers; therefore, we did not attempt to withdraw them, and further followed his advice by attempting to supplant one by another, particularly in the case of our third waiver, where we sent that to definitely limit the time to the date shown.

Redirect Examination.

The waiver referred to in petitioner's Exhibit 9 was never filed with the Government by our authority. Afterwards, and about June, 1933, I learned that it had been filed. After I sent this waiver to our New York correspondent under the terms stated I tried to get in touch with the New York correspondent to find out what he had done with it, but was not successful. When I did get in touch with him he did not know what had become of the waiver. I do not remember exactly how long he remained in our employ after that time; he was engaged to perform special services in connection with a special phase of this case and after our attempt to obtain further relief under the special assessment section his work was finished when we abandoned that and reverted back to our original tax consultant.

The Court. All of those questions were also addressed to the fifth waiver, were they not?

Mr. Henry. They were.

Mr. Smith. I should like to offer in evidence—I think perhaps I had better read the motion to amend the answer, which was allowed December 3, 1934. (p. 11).

"Now comes the respondent in the above-entitled action and moves to amend its answer to the amended petition as follows:

"The respondent, not waiving its motion to amend its answer, filed on January 15, 1931, and allowed on said date, and its answer to the amended petition filed on February 16, 1931, but expressly embodying herein by reference all facts alleged in said motion (including the exhibits attached hereto) and in said answer, further answers the amended petition as follows:

"And further answering the respondent says that on December 10, 1925, the petitioner filed a waiver ex-

tending the statutory period for the assessment and collection of taxes for the year 1918 until December 31, 1926. A certified copy of said waiver is attached hereto, marked 'Exhibit F' and by reference made a part hereof."

Mr. Smith. I should like to offer in evidence a certified copy of the waiver attached to this document.

(Certified copy of waiver, December 10, 1925, marked Defendant's Exhibit A.)

The Court. The certified copy will then be a part of the pleadings and evidence also?

Mr. Smith. Yes, your Honor.

This waiver is dated December 10, 1925, and reads (p. 12):

"In pursuance of the provisions of existing Internal Revenue Laws Bertelsen and Petersen Engineering Co., a taxpayer of East Boston, Mass., and the Commissioner of Internal Revenue hereby waive the time prescribed by law for making any assessment of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the year 1918, under existing revenue acts, or under prior revenue acts.

"This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1926, and shall then expire except that if a notice of a deficiency in tax is sent to said taxpayer by registered mail before said date and (1) no appeal is filed therefrom with the United States Board of Tax Appeals then said date shall be extended sixty days, or (2) if an appeal is filed with said Board then said date shall be extended by the number of days between the date of mailing of said notice of deficiency and the date of final decision by said Board.

BERTELSEN & PETERSEN ENG. CO.
Taxpayer
By Paul J. Bertelsen."

Thereupon the respondent offered in evidence a certified copy of a claim for refund for the year 1918, filed November 28, 1927, for the amount of $34,555.68, signed by Bertelsen & Petersen Engineering Company, by Jens Bertelsen, President. (It appears that this exhibit was not identified nor received in evidence—see top p. 13, Sten. Rec.)

Thereupon the respondent offered in evidence a (certified photostat copy of a) letter from C. B. Allen, Deputy Commissioner of Internal Revenue, to Bertelsen & Petersen Engineering Company, dated February 6, 1928, which was marked Defendant's Exhibit B and read into the record, and is as follows (p. 15):

"Your claims for refund of $34,555.68 and $34,555.68, corporation income and profits taxes for the years 1917 and 1918, respectively, have been examined.

"The contentions set forth in the brief filed in support of the claims are as follows:

"1. That the interest due you because of an overassessment for 1917 in the amount of $91,570.34 was not correctly computed.

"2. That an additional tax for 1918 amounting to $34,555.68 was never assessed, but in 1927 after the expiration of a waiver which extended the period of assessment to December 31, 1926, the additional tax for 1918 was used as an offset against the overassessment for 1917.

"As to the interest computations, the matter should be taken up with the Collector of Internal Revenue for your district.

"In regard to the 1918 assessment, the records of this office show that assessment was made on the July 1926 List #1, Page 0, Line 0. Consequently the assess-

ment was not outlawed and the adjustment made in the Collector's office was made in accordance with income tax laws and regulations.

"Your claim will, therefore, be rejected and the rejection will appear on the next schedule to be approved by the Commissioner."

Mr. Henry. I move that be excluded for the same reasons as the other.

The Court. I will exclude that and save your exception if you want it.

Mr. Smith. I would like to have my exception saved, if your Honor please.

Mr. William Swindlehurst, called as a witness by and on behalf of the respondent, after being sworn, testified as follows:

Direct Examination.

My name is William Swindlehurst. I am a clerk in the Income Tax Unit, Bureau of Internal Revenue, Washington, D. C. I have been with the Bureau of Internal Revenue since 1919. In the years 1925 and 1926 I was chief of the Additional Assessments and Records Subsection, and had charge of preparing the Commissioner's additional assessment list. It was my duty to supervise the preparation of these cases and to reach a determination of whether there was a valid waiver or whether the statute of limitations was not waived at the time of the assessment. The next step was to prepare the case for assessment and prepare the Commissioner's additional assessment list.

Thereupon the witness was handed Petitioner's Exhibit 3. The witness was referred to Petitioner's Exhibit 3, as contained on pages 33 and 34 of the transcript of the record on appeal (Plaintiff's Exhibit I), and was asked if his initials appeared anywhere on the certificate of assessment as therein shown.

The Witness. They do, in the middle of the page, just below the words "Office of Commissioner of Internal Revenue, July 3, 1926." The other initials preceding mine represent other officials who also initialed the Commissioner's assessment certificate. I am familiar with the original of this assessment certificate and the remarks on page 34 of the record (referring to Plaintiff's Exhibit 1), about three lines from the bottom of the page. These "remarks" which appear in the Commissioner's assessment list read: "1918 403152 RAR Waiver OL 1/23/26," which mean that the "1918" refers to the taxable year involved; "403152" represents the account number appearing on the tax return, income tax return; "RAR" refers to the income agent's report in the file; "Waiver" refers to the waiver in the file which was good, at least extended the statute beyond the date of the assessment which was July 3, 1926; and "OL 1/23/26" refers to an office letter dated January 23, 1926, otherwise called the "60-day letter."

The Court. Was that your writing there?

The Witness. These were my initials.

The Court. All these initials which you speak of were yours?

The Witness. Well, we only refer to one set of mine. The rest were other's initials.

The Court. Your interpretation is what the other officials meant by those symbols,

The Witness. These symbols I just read off,

The Court. Oh, no, sir. They have nothing to do with the initials we are talking about. These symbols, "1918 403152 RAR Waiver," and so on, are entered in the "Remarks" column of the assessment list.

The Court. By you:

The Witness. By the persons in my subsection, of which I had supervision.

The Court. That is your understanding! What you

have given is your understanding of what they meant when they entered those things?

The Witness. That is my understanding or knowledge of the procedure in my subsection, since I directed it.

The Witness. I supervised the assessment list with the assessment of $34,555.68 against the Bertelsen & Petersen Engineering Company which appears in the certificate on page 34 of the transcript. After the assessment list was prepared there was a second examination by what we call the administrative file and also the income tax papers and waivers. It was then compared with this Commissioner's assessment list independent of the first preparation of the case and these employees were directed to see that the entries made in the Remarks column were made from the proper returns, papers, and waivers.

The Court. Who made the check in this case?

The Witness. We have no record of that.

The Court. You don't even know who made it?

The Witness. No, sir.

The Court. You certainly cannot say whether it is an accurate check or not if you do not know who made it. Was there somebody supposed to go over them every time?

The Witness. It was a part of their duties.

The Court. It is a part of your duties, too?

The Witness. A part of their duties.

The Court. Whether they do it or not is another question, is it not?

The Witness. You mean whether they do it in each individual case

The Court. Yes.

The Witness. We have evidence that it has been done.

The Court. That it has been done?

The Witness. Yes, sir.

The Court. You ought to if you are getting paid for it. Have you also evidence it has not been done?

The Witness. I mean in this particular case. We have an income tax return prepared with some notations placed in the assessment stamp. There is a stamp placed on the return of the amount of tax due, and they fill in that stamp after they make that check. They enter on the bottom of the stamp the list, page and line, wherever that assessment appears on the list, and that appears in the income tax return for 1918 in this case, which is in the record, I believe. The next step was to prepare the Commissioner's assessment certificate, which includes all items appearing in the list, and forwarded it to the Commissioner to be signed covering all items but in one amount.

Thereupon a certified copy of claim for refund dated November 28, 1927, was marked Defendant's Exhibit C and received in evidence.

Cross Examination.

The memorandum referred to as part of Petitioner's Exhibit 3 of the record on appeal (Plaintiff's Exhibit 1) was prepared by one of the Elliott-Fisher operators in the Bureau Income Tax Unit. I did not personally prepare it nor do I have any personal recollection concerning it. I was not asked at that time to produce any waivers or to testify with respect to them.

Redirect Examination.

My initials were attached to the assessment certificate and I approved the assessment list, assessing the sum of $34,555.68 against the Bertelsen & Petersen Engineering Company.

Mr. Gerald L. MacCauley, called as a witness by and on behalf of the petitioner, after being sworn, testified as follows:

My name is Gerald L. MacCauley. I live at Belmont. My business is that of Tax Consultant. I was called into this

case by Bertelsen & Petersen Engineering Company sometime in 1924. I recall receiving a waiver from Mr. Bertelsen with instructions with respect to it. At that time I had an office in New York, which was in December, 1925. With that waiver he wrote a letter to me stating that he had received a letter from the Government requesting a waiver, and he enclosed the waiver properly executed. The date of the waiver was the early part of December, 1925. Mr. Bertelsen requested that I send it to my correspondent at Washington, who at the time did follow-up work for me in the Departments, with the request that the necessity for filing it be looked into and that the waiver not be filed without Mr. Bertelsen's express consent after I had ascertained the views of my Washington correspondent. Shortly after that something came up with regard to Mr. Bertelsen's case in comparison of values in the special relief section, and I had some disagreement with this fellow in Washington. I received no reply from him after I sent him the waiver, and these various other things were coming up continually and we just lost track of it. I did not report back to Mr. Bertelsen. I did not learn that it had not been filed until some time in 1933. Mr. Bertelsen called upon me and asked whether it had been filed or not. I made no investigation. Mr. Bertelsen found out that it had been filed after looking it up in Washington.

The above constitutes all the facts material to the issues raised by this bill of exceptions.

At the trial the respondent filed the following written motion for judgment:

> Now comes the respondent in the above-entitled action and on the pleadings and the evidence herein moves that any judgment to be entered for the plaintiff be limited to Forty-four Dollars and Seven Cents ($44.07).

The case was continued generally and, on April 22, 1936, the Court handed down a written opinion in which it made

Findings of Fact and Conclusions; denied the respondent's motion for judgment; and ordered judgment for the petitioner in the amount of $31,555.68, with the interest to be agreed upon between the parties hereto or "by a subsequent determination by this court if they are unable to agree." The respondent during the course of the trial excepted to the denial by the Court of its motion for judgment. The opinion of the Court containing its Findings of Fact and Conclusions is made a part hereof by reference.

The respondent, being aggrieved by the denial by the Court of its motion for judgment, and by its ordering judgment for the petitioner, and by the findings and rulings of the Court, now excepts to said findings and rulings of the Court, and therefore brings this bill of exceptions and prays that it may be allowed.

By its Attorneys,

FRANCIS J. W. FORD,
United States Attorney.

By: ARTHUR L. MURRAY,
Special Assistant to the United States Attorney.

Assented to:
RAY HENRY,
Attorney for the Petitioner.

Allowed 10-20-1936.

GEORGE C. SWEENEY,
United States District Judge.

4146 Law
Defts Ex C
JEG Jr
1/3/36

UNITED STATES OF AMERICA
TREASURY DEPARTMENT
WASHINGTON

August 31, 1932.

PURSUANT to the provisions of Section 661, Chapter 17, Title 28 of the United States Code (Section 882 of the Revised Statutes of the United States), I hereby certify that the annexed is a true copy of Claim for Refund of $34,555.68 Income and Profits Tax for 1918, (with brief and photostat copies of letters, waivers, Agreements—Forms A, statements and copy of Certificate of Overassessment attached), filed by Bertelsen and Petersen Engineering Company, East Boston, Massachusetts, on file in this Department.

[SEAL]

IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury:

F. A. BIRGFELD.
Chief Clerk, Treasury Department.

MM

MW WWB AMR W TS CMC B
H. C. C.

Form 66—Revised November, 1929—TREASURY DEPARTMENT, CHIEF CLERK AND SUPERINTENDENT.

U. S. GOVERNMENT PRINTING OFFICE: 1929 2—8615

(EXECUTE SEPARATE FORM FOR EACH CLAIM.)

"(ERANTS)" DEPARTMENT
[illegible]

CLAIM FOR

- ☐ ABATEMENT OF TAX ASSESSED
- ☐ CREDIT AGAINST OUTSTANDING ASSESSMENTS
- ☒ REFUND OF TAXES ILLEGALLY COLLECTED
- ☐ REFUND OF AMOUNTS PAID FOR STAMPS USED IN ERROR OR EXCESS

IMPORTANT
File with Collector of Internal Revenue before statement can be audited. Not acceptable unless completely filled in.

COLLECTOR'S NOTATION
District
Account number
Date received
Amount
Collector of Internal Revenue

NOTICE TO COLLECTOR
Collector must indicate in block above the kind of claim, except in Income Tax cases.

Date received by Administrative Unit
Stamp here

NOV 20 1922
CLAIM DY. INT. REVENUE
RECEIVED BOSTON, MASS.
NOV 28 1922

State of Massachusetts } ss.
County of Suffolk }

TYPE OR PRINT

BERTELSEN & PETERSEN ENGINEERING CO.
(Name of taxpayer as shown on return)
256 BORDER STREET
(Residence—give street and number as well as city or town and State.)
EAST BOSTON, MASS.
(Post office)

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

		YEAR
From:	Jan. 1	19 18
To	Dec. 31	19 18

1. Business in which engaged
2. Character of assessment or tax: Income and Profits Tax
(State for or upon what the tax was assessed or the stamps affixed.)
3. Amount of assessment or stamps purchased — $
4. Reduction of Tax Liability requested (Income and Profits Tax) — $
5. Amount to be abated — $
6. Amount to be refunded (or such greater amount as is legally refundable) — $34,555.66
7. Dates of payment (see Collector's receipts or indorsements of canceled checks)
(If statement covers income tax liability, items 8-11, inclusive, must be answered.)
8. District in which return (if any) was filed
9. District in which unpaid assessment appears
10. Amount of overpayment claimed as credit — $
11. Unpaid assessment against which credit is asked; period from ____ to ____ — $

Deponent verily believes that this application should be allowed for the following reasons:

* Plus such larger amount as may result, plus interest.

Refund of additional taxes for this year of $34,555.68, same having been paid out of refund for 1917 thru withholding by your Department. See brief for details.

(Attach additional sheets if necessary.)

Sworn to and subscribed before me this 24th day of November, 1922

John W. Reader
Notary Public
(Title.)

Signed:
Bertelsen & Petersen Engineering Co.
Jens Bertelsen President

(This affidavit may be sworn to before a Deputy Collector of Internal Revenue or Revenue Agent without charge.)

G—1176

21

202717G

Schedule No. .....

CERTIFICATES

I certify that an examination of the records of the Bureau of Internal Revenue shows the following facts as to the assessment and payment of the tax:

Name of taxpayer.	Character of assessment and period covered.	Lit.	Year.	Month.	Page.	Line.	Amount.	Date paid.	District in which paid.
	Corp Inc 1918	Reg	1922	Jul 31			$		
					99	15			
		1st Ltr	1920	July	1	1	0.01		
		4th Ltr	1920	Dec	31	8			

Thomas M. White

Collector of Internal Revenue.

Assessment Clerk, Commissioner's Office.

Claim No. .....

I certify that the records of my office show the following facts as to the purchase of stamps:

To whom sold or issued.	Kind.	Number.	Denomination.	Date of sale or issue.	Amount.	If special tax stamp, state: Serial number.	If special tax stamp, state: Period commencing—
					$		

Collector _____ District _____

Claim No. .....

Schedule Number .....

District .....

Allowed or Rejected Number .....

(Nature of tax.)

Claimant .....

Address .....

Examined and submitted for action ....., 10.....

COMMITTEE ON CLAIMS

Schedule No. .....

Claim examined by—
E. E. H

Claim approved by—

Chief of Division.

Amount claimed... $ 34 555.68

Amount allowed... $ None

Amount rejected... $ 34 555.68

B2

Hancock 2755 Boston
Washington

JAMES V. GIBLIN COMPANY
Certified Public Accountants
Audits - Taxes - Cost Systems
456 Park Square Building
Boston

Received
Jan 7 1928
Service Section

BERTELSEN AND PETERSEN ENGINEERING CO.
256 BORDER STREET,
EAST BOSTON, MASS.

November 25, 1927

Commissioner of Internal Revenue, 1917 cl #2027180
Income Tax Unit, 1918 cl #2027179
Treasury Dept.,
Washington, D. C.

The Hon. Commissioner:

This corporation advises receipt of Overassessment Certificate for 1917 in the amount of $91,570.34; against this Overassessment there were applied two deficiencies in tax for the years 1918 and 1919.

With reference to the year 1919, the said Overassessment was small and the invoice therefor duly billed this corporation, so that against the crediting of the same no protest is entered.

With reference, however, to the year 1917 and 1918, these two periods were always handled jointly by your Department, the 1919 communication being received entirely separate. The final deficiency for 1917 and 1918 under the following notation "IT:E:SM SBD—10443 A-5983" is as follows:

Year	Deficiency in Tax	Overassessment
1917		$91,570.34
1918	$34,555.68	
Net Overassessment		$57,014.66

When the Certificates of Overassessment were received, the net Overassessment had been reduced still further by the deficiency of 1919 duly assessed. Further, upon receipt of the actual Overassmessment Certificate, your Department had computed interest upon the net tax receivable, so that both the 1918 and 1919 credits had been applied, and instead of receiving interest upon the gross amount, interest was apparently paid on the 1917 Overassessment itself for one year, then on the said $57,014.66 net amount for second year, and then interest on the further reduction by the 1919 tax from the year 1920 until date of receipt.

The corporation protests in two respects at this time: First, that the 1919 assessment was duly made and properly creditable out of the 1917 refund, but that the 1918 assessment was never duly made, and hence should not be deducted from 1917. The corporation, therefore, requests refund of $34.555.68—1918 tax withheld out of the 1917 refund erroneously.

As the year 1917 is now outlawed from further additional taxes or refunds, a Refund Claim has been filed for the year 1918, in which year you have thus caused to be paid a deficiency in tax of $34,555.68 after same was outlawed. The corporation has not had its 1917 original refund rejected more than two years ago and is hence also filing a Refund Claim for 1917 as a protective measure, on the basis that the Refund Claims resulted in allowance of $34,555.68 more than was actually paid.

Secondly, in addition to asking for the return of the amount collected out of 1917 Overassessment, the corporation also requests proper computation of interest based upon the following: That the full interest be paid on the $91,570.34 Overassessment for two full years, namely, from 1918 to 1920, and that thereafter the interest be computed on the basis of the said same gross Overassessment for 1917 less

the additional tax for 1919 payable in 1920, but correctly deductible from the 1917 Overassessment.

With reference to the legal outlawing of the 1918 tax, you are advised as follows: This corporation was subjected to the usual Field Agent's inspection, which resulted in a substantial additional tax for 1917, 1918 and 1919. There was an Overassessment for 1920, copy of which is contained hereinafter. Therefore, this year is not in dispute at this writing. There were small additional taxes for the years prior to 1917 credited against 1920. The adjustment for this period is self-explanatory in the copy of the attached Overassessment Certificate.

For 1918, the relevent facts are as follows: Letter was received, dated October 25, 1924, photostated copy of which is enclosed, stating that conference would be granted November 21, 1924, and concluding with the following paragraph:—

> "In view of the early expiration of the waivers at present on file from your corporation for the years 1917 and 1918, and in view of the fact that the statutory period within which the Commissioner may assess additional taxes for the year 1919, will expire presently, it is requested that renewal waivers for the years 1917 and 1918, and waiver for 1919, be executed by your corporation and forwarded to this office.
>
> "Blank forms of waivers are enclosed."

This paragraph reveals, and same comes from your office, that Waivers were originally filed for 1917 and 1918, which apparently would expire March 15, 1925.

You request in the foregoing communication Waivers for 1917, 1918 and 1919. Copy of this Waiver undated is also attached. The records in our files now show that the Waivers in question, apparently not material to the case at

this writing, were signed and executed and forwarded to you November 19, 1924. There remains in our files a copy of the 1919 Waiver only, but it is presumed that from your communication that the 1917 and 1918 Waiver was placed in one agreement, and the 1919 Waiver in another, so that you have two Waivers covering the three years. These are not material at this writing other than to give the outline prior to your notification to forward the important Waiver at issue.

In 1925, this corporation cancelled Power of Attorney to Mr. James V. Giblin and J. A. Vanden Heuvel, and gave new Power of Attorney to a Mr. McCauley. It was Mr. McCauley's intention merely to request additional Relief against the year 1918 only, not disputing the refund for 1917 nor the additional tax for 1919.

Towards the end of 1925, letter dated December 5, 1925, initialed "IT:E:SM:SBD A-5983", was received, which is also photostated herein, stating that additional Waiver was requested for 1918 only. We quote from the concluding paragraph as follows:

> "However, the statutory period as extended by the waiver now on file, within which the Commissioner may assess additional taxes for the year 1918, will expire presently and in order to avoid the necessity of making an assessment prior to such consideration, it is requested that you sign and return to this office within ten days from the date of this letter the enclosed waiver for the year 1918, by which you will note that you agree to an extension of time within which additional taxes may be assessed, if any are found to be due, to December 31, 1926, except as provided in the form of waiver."

It is noted that the foregoing Waiver would extend our case until December 31, 1926, apparently the prior Waiver extending the year 1918 taxable period only to March 15, 1926. This, again, is unimportant.

The important point is that under date of December 9, 1925, this corporation properly executed and forwarded the Waiver mentioned in your communication of December 5, 1925.

It is realized that the Waiver enclosed by you extended the time for making assessment only irrespective of determination until the end of 1926, the concluding paragraph in the said Waiver reading as follows:

> "This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1926, and shall then expire except that if a notice of a deficiency in tax is sent to said taxpayer by registered mail before said date and (1) no appeal is filed therefrom with the United States Board of Tax Appeals then said date shall be extended sixty days, or (2) if an appeal is filed with said Board then said date shall be extended by the number of days between the date of mailing of said notice of deficiency and the date of final decision by said Board."

As this Waiver was properly prepared and forwarded to you, it was, therefore, in existence during the entire calendar year 1926. Photostated copy of the Waiver in question is enclosed, the only relevant point therein being the expiration date—December 31, 1926; shortly after the execution thereof, on December 30, 1925, this corporation requested that the Certificate of Overassessment for 1917 be forwarded and the year 1918 withheld for final determination.

A communication was received from your Department, photostated copy of which is also enclosed, initialed "IT:E:SM:SBD—10443 A-5983", in which you state that you are unable to comply with the request for separation of the two periods, inasmuch as you intend to apply the deficiency for 1918 against the Overassessment for 1917. This, we believe,

was an erroneous ruling on your part, as you forwarded the 1920 Overassessment without consideration of the three prior periods, which at that time contained net deficiencies, and you also assessed the 1919 tax while there still was a gross Overassessment for 1917. Each of these years is handled separately; despite the fact that at the time each was finally settled, there were deficiencies and Overassessments existing. The relevant paragraph therein reads as follows:

> "You are advised that this office is unable to comply with your request for the reason that any additional tax which may be found to be due for the year 1918 will be offset against the overassessment for 1917, and as the final determination of the 1918 case has not yet been made, the 1917 case may not be closed at this time."

Apparently, in the foregoing you intended to apply the 1918 existing deficiency against the 1917 Overassessment, which is contrary to the practice of your Department in our case, and, according to our Auditors, in all other cases, each year resting upon its own merits and the respective Law covering same and subject entirely to separate adjustments.

The withholding process, therefore, for 1918 initiated from your own Department in your letter of January 14, 1926. Your letter of January 14th was immediately followed by the important communication in this case, same being dated January 23, 1926. This was an official sixty-day notice and is photostated within. This communication denied our protests of October 15, 1925 and October 28, 1925 with reference to further Special Relief for 1918 and re-substantiated your letter dated September 16, 1925. Photostat, therefore, is enclosed of your sixty-day communication, together with the first sheet, but omitting agreements of deficiency, which are in our possession and unsigned.

The figures contained in the sixty-day letter are identical

with those appearing in the communication dated September 16, 1925. There is, therefore, photostated the self-same figures, together with final determination in the communicatcn dated September 16, 1925.

With reference to the sixty-day communication, no protest against same was entered. In the interim, February 26, 1926, the 1926 Act was passed. The new Congressional Enactment extended the sixty-day period for all pending deficiency notices to April 27, 1926. In conformity therewith, your Department further notified this corporation in letter dated March 20, 1926, photostat of which is also enclosed, that under Section 283 (c)—sixty days additional was granted. In our case, this resulted in an extension from March 23, 1926 to April 27, 1926, or approximately thirty-three days. No protest was entered thru Petition to the Tax Board either with regard to the original sixty-day notification or the extension thereto.

Meanwhile, the said Waiver dated December 9, 1925 continued, and it was presumed that in the absence of protest, assessment would subsequently follow. Nothing further was, therefore, heard from your Department with reference to same other than the tracing of our 1917 refund, which this corporation needed to such extent that it desired to hasten receipt of same. After preparation of the Certificate, exhaustion of the Appropriation prevented payment of same in October, 1926. The Overassessment was, therefore, withheld until passage of the New Act and re-appropriation by Congress. It was then remanded to the new sixty-day review file, as required under the 1926 Act, returned to the Unit, and again remanded to the sixty-day file, and finally delivered to us in October 1927, representing a whole year's delay before the actual payment of cash.

Upon analysis of actual Certificate, it revealed that you had credited the 1918 proposed deficiency of $34,555.68 out

of the year 1917, as well as having computed the interest on net yearly balances, as explained at the commencement of this brief.

Protest is entered specifically against the crediting of the 1918 tax when outlawed against 1917.

Your Department has definitely established a Regulation providing for non-application of outlawed deficiencies against legally paid refunds. With respect to this point, therefore, there is no dispute. We quote from Consolidated U. S. Income Tax Laws—Solicitor's Opinion 1095, as follows:

> "BARRED ASSESSMENTS NOT SET OFF AGAINST REFUND.—An amount refundable under Sec. 252 of the Revenue Act of 1921 cannot be applied against a tax which is not collectible, either by assessment or suit, due to the running of the statute of limitations. Although Sec. 250 (d), Act of 1921, is purely a statute of limitations, so that the right of the Government to the tax still exists and merely the remedy for collection is lost, the expression 'then due' in Sec. 252 refers to an enforceable claim of the Government and is more restricted than simply 'owing'—Sol. L. Op. 1095, I-1 C. B. 313."

The only question which arises, therefore, is whether or not the 1918 deficiency is outlawed and uncollectible, hence not possible of credit application against 1917. The sole fact in the case in view of the foregoing Regulation is that the 1918 tax was never assessed, hence uncollectible.

The single fact upon which the corporation relies is that the Commissioner thru his Agent, the Collector, never actually assessed the tax. The undersigned and the corporation's attorney, Mr. J. V. Giblin, upon receipt of the Overassessment Certificate, net, immediately advised the Collector that no assessment had ever been made. The Collector's records

also immediately revealed that said assessment had never been actually made.

It appears that in August 1926, in accordance with the Collector's records and our Overassessment Certificate, your Department thru its agency merely credited the 1918 tax against the 1917 refund. The only official notification of the assessment is your letter of September 16, 1925 and your sixty-day communication of January 23, 1926.

Your Regulations are clear that if a sixty-day notification is received within the period of limitations, then legal assessment may follow. However, the said assessment must follow within one hundred and twenty days. Inasmuch as it appears from the 1926 Regulations that the sixty-day notification is not an assessment we quote from Section 273 (c) as follows:

> "If the taxpayer does not file a petition with the Board within the time prescribed in subdivision (a) of this section, the deficiency, notice of which has been mailed to the taxpayer, shall be assessed, and shall be paid upon notice and demand from the Collector."

It is noted from the wording of the foregoing that the sixty-day communication is merely a notification of proposed deficiency and that it must be supplemented by an actual assessment. If protest is entered against the sixty-day letter, then the Commissioner is forbidden from actual assessment until such time as decision is rendered by the Board. It is conceded in the instant case that the sixty-day letter was duly forwarded within the limitation period.

Section 277 (b) provides as follows:

> "(b) The running of the statute of limitations provided in this section or in section 278 on the making of assessments and the beginning of distraint or a pro-

ceeding in court for collection, in respect of any deficiency, shall (after the mailing of a notice under subdivision (a) of section 274) be suspended for the period during which the Commissioner is prohibited from making the assessment or beginning distraint or a proceeding in court, and for 60 days thereafter."

It appears from the foregoing, therefore, that when duly notified thru a sixty-day letter, the Commissioner apparently has sixty days additional in which to assess if no protest is entered and sixty days after final determination to assess if protest is entered. Not having offered protest, the Commissioner would have until April 27, 1926 plus sixty days in this case as a maximum period, or approximately June 26, 1926, within which to assess, except that Waiver existed during the entire year 1926.

It now appears that no assessment was ever made, but that in conformity with your own insistence in your letter of January 14, 1926, in which you refused to close 1917 completely and separately, the amount was credited. To this date, the corporation has thus not received an actual physical assessment notification, and consultation with the Collector's Office reveals that no such notification was ever forwarded to the corporation. The corporation is of the opinion that actual assessment, as distinguished from theoretical assessment thru credit, cannot be made at this late date, as the Waiver expired December 31, 1926.

The taxpayer did not know of the credit application against 1917 until actual receipt of Overassessment Certificate in net amount in October 1927, therefore, did not know during 1926 that your Department had not assessed the tax other than there was a complete absence of the receipt of the assessment.

In addition to alleging that the corporation has not been duly assessed, hence the amount deducted from 1917 has been illegally withheld, the corporation requests that interest be

computed on the complete 1917 Overassessment less only the 1919 admittedly legal assessment.

Immediate hearing on the foregoing is requested in order that the corporation may present suit in Federal Court if the two legal adjustments aforementioned are not conceded by your Department.

Respectfully submitted,

BERTELSEN AND PETERSEN ENGINEERING CO.

By JENS BERTELSEN, *President.*

The foregoing subscribed and sworn to before me this 26th day of November, 1927.

JOHN W. VEADER, (SEAL)

Notary Public.

TREASURY DEPARTMENT

WASHINGTON

[SEAL]

Office of

Commissioner of Internal Revenue

Address Reply to
Commissioner of Internal Revenue
And Refer to
IT:CA:2113-4

Oct 25 1924

Bertelson & Petersen Engineering Co.,
256 Border St.,
East Boston, Mass.

Sirs:

Receipt is acknowledged of letter dated October 16, 1924, of J. A. Vanden Heuvel and Company, Washington, D. C., enclosing brief covering 1918 to 1920, prepared on behalf of your corporation.

You are advised that a conference has been arranged for

1:45 o'clock, November 21, 1924, Room 114, Treasury Annex #2, Fifteenth Street and Ohio Avenue, Northwest, Washington, D. C.

In view of the early expiration of the waivers at present on file from your corporation for the years 1917 and 1918, and in view of the fact that the statutory period within which the Commissioner may assess additional taxes for the year 1919, will expire presently, it is requested that renewal waivers for the years 1917 and 1918, and waiver for 1919, be executed by your corporation and forwarded to this office.

Blank forms of waivers are enclosed.

Respectfully,

J. G. BRIGHT,
Deputy Commissioner.

By JOHN G. KENNEY,
Chief of Section.

P.J.B.
Enclosures:
3 waiver forms.

_____

(Date)

INCOME AND PROFITS TAX WAIVER

In pursuance of the provisions of subdivision (d) of Section 250 of the Revenue Act of 1921, Bertelsen & Petersen Engineering Co. of East Boston, Mass., and the Commissioner of Internal Revenue, hereby consent to a determination, assessment, and collection of the amount of income, excess-profits, or war-profits taxes due under any return made by or an behalf of the said ..... tax-payer ..... for the year ..... 1919 ..... under the Revenue Act of 1921, or under prior income, excess-profits, or war-profits tax

Acts, or under Section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes", approved August 5, 1909. This waiver is in effect from date it is signed by the taxpayer and will remain in effect for a period of one year after the expiration of the statutory period of limitation, or the statutory period of limitation as extended by any waivers already on file with the Bureau, within which assessments of taxes may be made for the year or years mentioned.

_____

Taxpayer

By _____

Treas.

_____

Commissioner.

If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed.

Signed and sent Nov. 19, 1924

_____

[SEAL] TREASURY DEPARTMENT
WASHINGTON

Office of
Commissioner of Internal Revenue

Address Reply to
Commissioner of Internal Revenue
And Refer to
IT:E:SM
SBD-A-5983 Dec 5 1925

Bertelsen and Petersen Engineering Company,
East Boston, Massachusetts.

Sirs:

Reference is made to your income and profits tax return for the year ended December 31, 1918, and to your protest against the rate allowed in the assessment of your profits tax under the provisions of Section 328 of the Revenue Act of 1918, as set forth in Bureau letter dated September 16, 1925.

Your protest is now under consideration, and you will be advised of the final determination of the tax liability at the earliest practicable date.

However, the statutory period as extended by the waiver now on file, within which the Commissioner may assess additional taxes for the year 1918, will expire presently and in order to avoid the necessity of making an assessment prior to such consideration, it is requested that you sign and return to this office within ten days from the date of this letter the enclosed waiver for the year 1918, by which you will note that you agree to an extension of time within which additional taxes may be assessed, if any are found to be due, to December 31, 1926, except as provided in the form of waiver.

In your letter of transmittal, please refer to IT:E:SM, SBD-A-5983.

Respectfully,

C. R. NASH,
Assistant to the Commissioner.
By LESLIE GILLIS,
Acting Chief of Section.

(74M)

TREASURY DEPARTMENT

Internal Revenue Service

Form 872A

INCOME AND PROFITS TAX WAIVER

FOR TAXABLE YEARS ENDED PRIOR TO JANUARY 1, 1922

IT:E:SM

SBD:A—5983

....., 192

In pursuance of the provisions of existing Internal Revenue Laws Bertelsen and Petersen Engineering Co., a tax-payer of East Boston, Mass., and the Commissioner of Internal Revenue hereby waive the time prescribed by law for making any assessment of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said tax-payer for the year 1918, under existing revenue acts, or under prior revenue acts.

This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1926, and shall then expire except that if a notice of a deficiency in tax is sent to said taxpayer by registered mail before said date and (1) no appeal is filed therefrom with the United States Board of Tax Appeals then said date shall be extended sixty days, or (2) if an appeal is filed with said Board then said date shall be extended by the number of days between the date of mailing of said notice of deficiency and the date of final decision by said Board.

Assessment after June 2, 1924.

6 more years to collect.

Sent to MacCauley Dec 10/25

.....

Taxpayer

By .....

.....

Commissioner

If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed.

[SEAL]

TREASURY DEPARTMENT
WASHINGTON

Office of
Commissioner of Internal Revenue

Address Reply to
Commissioner of Internal Revenue
And Refer to
IT:E:SM
SBD-10443
A-5983

Jan 14 1926

Bertelsen and Petersen Engineering Company,
256 Border Street,,
East Boston, Mass.

Sirs:

Receipt is acknowledged of your letter dated December 30, 1925, wherein you state that you accept the adjustment indicated in Bureau letter dated September 16, 1925 for the year 1917, resulting in an overassessment of $91,570.34 and request that the 1917 case be closed without waiting for the final determination of your tax liability for the year 1918.

You are advised that this office is unable to comply with your request for the reason that any additional tax which may be found to be due for the year 1918 will be offset

against the overassessment for 1917, and as the final determination of the 1918 case has not yet been made, the 1917 case may not be closed at this time.

Any further communication relative to this case should bear the symbols IT:E:SM-SBD-10443, A-5983.

Respectfully,

C. R. NASH,

Assistant to the Commissioner.

By LESLIE GULLS,

Acting Chief of Section.

JB
P.J.B.

TREASURY DEPARTMENT

WASHINGTON

OFFICE OF
COMMISSIONER OF INTERNAL REVENUE

IT:R: [redacted]
[redacted]
[redacted]

JAN 23 1926

Bartelsen and Petersen Engineering Company,

[redacted] Boston, Massachusetts.

Sirs:

An audit of your income and profits tax returns for the years 1917 and 1918 has resulted in the determination of a deficiency in tax of $84,566.68 for the year 1918 and an overassessment for the year 1917 of $91,870.34, as shown in the attached statement.

In accordance with the provisions of Section 274 of the Revenue Act of 1924, you are allowed 60 days from the date of mailing of this letter within which to file an appeal contesting in whole or in part the correctness of this determination. Any such appeal must be addressed to the United States Board of Tax Appeals, Washington, D. C., and must be mailed in time to reach that Board within the 60-day period.

Where a taxpayer has been given an opportunity to appeal to the Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has appealed and an assessment in accordance with the final decision on such appeal has been made, no claim in abatement in respect of any part of the deficiency will be entertained.

If you acquiesce in this determination and do not desire to file an appeal, you are requested to sign the inclosed agreement consenting to the assessment of the deficiency and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of [redacted]. In the event that you acquiesce in a part of the determination, the agreement should be executed with respect to the items agreed to.

Respectfully,

D. H. BLAIR

Commissioner

By [redacted]

Inclosures:
Statements
Agreement - Form A

[redacted]

B25

TREASURY DEPARTMENT
Bureau of Internal Revenue
Form 866—Aug., 1924

Form A

In re: Bertelsen and Petersen Engineering Co.,
East Boston, Massachusetts.

AGREEMENT CONSENTING TO ASSESSMENT OF A DEFICIENCY

The undersigned taxpayer hereby waives the right of appeal under Section 274 (a) of the Revenue Act of 1924 with respect to the items listed below* and consents to the immediate assessment of the deficiency in tax resulting therefrom. These items are included in a deficiency in tax aggregating $ 24,988.68 as indicated by letter from the Commissioner of Internal Revenue, Washington, D. C., dated JAN 2 2 19[illegible], bearing the symbols IT:E:88-4CD A-8965, or as indicated in the report of the Revenue Agent in Charge at ..... dated .....

(Attach additional sheets if necessary)

(Corporate seal to be affixed; if no seal, so state)

_____
(Name)

_____
(Address)

Date _____ By _____

*Where the taxpayer consents to the assessment of the entire amount of the deficiency shown by the letter from the Commissioner or as indicated in the report of the Revenue Agent in Charge, the items need not be listed; reference may be made to the letter or report.

Note.—This agreement is subject to the approval of the Commissioner and is not an agreement as provided under Section 3760, Revenue Act of 1924.

AB-1

This copy to be retained by taxpayer.

826

TREASURY DEPARTMENT
Bureau of Internal Revenue
Form 2285—Aug., 1929

In re: Bertelsen and Petersen Engineering Co.,
East Boston, Massachusetts.

Form A

AGREEMENT CONSENTING TO ASSESSMENT OF A DEFICIENCY

The undersigned taxpayer hereby waives the right of appeal under Section 274 (a) of the Revenue Act of 1924 with respect to the items listed below and consents to the immediate assessment of the deficiency in tax resulting therefrom. These items are included in a deficiency in tax aggregating $ 34,288.68 as indicated by letter from the Commissioner of Internal Revenue, Washington, D. C., dated Nov. , bearing the symbols IT:E:EM:IOD 885-10643 A-8483, or as indicated in the report of the Revenue Agent in Charge at

dated

(Attach additional sheets if necessary)

(Corporate seal to be affixed; if no seal, so state)

(Name)

(Address)

Date By

*Where the taxpayer consents to the assessment of the entire amount of the deficiency shown by the letter from the Commissioner or as indicated in the report of the Revenue Agent in Charge, the items need not be listed; reference may be made to the letter or report.

Note.—This agreement is subject to the approval of the Commissioner and is not an agreement as provided under Section 3760, Revenue Act of 1924.

827

STATEMENT.

IT:E:SM:60D
SBD—10443
A—5983

In re: Bertelsen and Petersen Engineering Company,
East Boston, Massachusetts.

Years Examined.	*Deficiency in Tax.*	*Overassessment.*
1917		$91,570.34
1918	$34,556.68	
Net overassessment		$57,014.66

Reference is made to your protest dated October 15, 1925, and to supplemental brief filed October 28, 1925, against the allowance of your application for assessment of your profits tax for the year 1918 under the provisions of Section 328 of the Revenue Act of 1918, as set forth in Bureau letter dated September 16, 1925.

After a careful review of your protest and of all the evidence submitted in support of your contentions, you are advised that the Bureau holds that the allowance of your application is based on a comparison with representative concerns, similarly circumstanced, as nearly as may be, to your company. Accordingly, the conditions set forth in the above-mentioned letter are sustained.

In addition to the rejection of the claims referred to in Bureau letter dated September 16, 1925, your two claims for the refund of $40,000.00 each, for the year 1917 and 1918, respectively, will be rejected in full.

The Collector of Internal Revenue for your district will be officially notified of the rejection.

The overassessment shown above will be made the subject of a certificate of overassessment which will reach you in due course through the office of the Collector of Internal

Revenue for your district and will be applied by that official in accordance with Section 281 (a) of the Revenue Act of 1924.

The right of appeal to the United States Board of Tax Appeals as indicated on page one of this letter, refers only to any deficiency intact indicated herein, inasmuch as there is no provision in the Revenue Act of 1924 granting the right of appeal against the determination of any overassessment found upon an audit of your returns.

A copy of this letter is being forwarded to your representative, Mr. J. A. Vanden Heuvel, 203-205 Metropolitan Bank Building, Washington, D. C.

JB

IFWORSM
SED-10443
A-5983

STATEMENT

In re: Bertelsen and Petersen Engineering Co.,
East Boston, Massachusetts

Year	Deficiency in Tax	Overassessment
1917		$91,570.34
1918	$34,555.68	

Net Overassessment $57,014.66

You are advised that after careful consideration and review, your application under the provisions of Sections 210 and 327 for assessment of your profits tax as prescribed by Sections 210 and 328 of the Revenue Acts of 1917 and 1918, respectively, has been allowed. Your profits tax is based upon a comparison with a group of representative concerns which, in the aggregate, may be said to be engaged in a like or similar trade or business to that of your company.

The result of the audit under the above-mentioned provisions is as follows:

1917

Net Income

Net income shown by field investigation	$432,711.71

Computation of Tax

Excess profits tax (Section 210)		$177,198.46
Net income as above	$432,711.71	
Less:		
Excess profits tax	177,198.46	
Amount taxable at 2%	$255,513.26	5,110.33
Amount taxable at 4%	255,513.26	10,220.66
Total tax assessable		$192,526.43
Tax previously assessed:		
Original, Account #1782847, April, 1918, List, Page 1395, Line 17,		$277,586.23
Additional, August, 1920, List, Page 31, Line 1,		6,510.54
Total tax assessed		$284,096.77
Total tax due		192,526.43
Overassessment		$ 91,570.34

829

In re: Bertelsen and Petersen Engineering Co.

In accordance with the above conclusions, your claims for the refund of $46,718.09 and $75,000.00, aggregating $121,718.09, will be rejected for $30,144.76.

1918

Net Income

Net income shown in Bureau letter dated December 23, 1924.			$399,389.29

Computation of Tax

Profits Tax (Section 328)			$260,308.85
Net income as above		$399,389.29	
Less:			
Profits tax	$260,308.85		
Exemption	2,000.00	262,308.85	
Amount taxable at 12½		$137,080.44	16,449.65
Total tax assessable			$276,758.50
Tax previously assessed:			
Original, Account #4C3152,		$242,384.72	
Less:			
Interest		345.15	
		$242,039.57	
Addition, August, 1920, List, Page 31, Line 2,		163.25	242,202.82
Deficiency in Tax			$ 34,555.68

In accordance with the above conclusions, your claims for the refund of $51,173.67 and $75,000.00, aggregating $126,173.67, will be rejected in full.

The Collector of Internal Revenue for your district will be officially notified of the rejection.

The overassessment shown above will be made the subject of a Certificate of Overassessment which will reach you in due course through the office of the Collector of Internal Revenue for your district and will be applied by that official in accordance with Section 281(a) of the Revenue Act of 1924.

830

(84)

[SEAL]

TREASURY DEPARTMENT
WASHINGTON

March 20, 1926.

Office of
Commissioner of Internal Revenue

Address Reply to
Commissioner of Internal Revenue
And Refer to
IT:R:P:7
Bertelsen and Petersen Engineering Company,
East Boston, Massachusetts.

Sir(s) or Madam:

Re: Office letter dated January 23, 1926.

Reference is made to the office letter under the above-mentioned date and your attention is invited to Section 283(c) of the Revenue Act of 1926, which reads as follows:

"If before the enactment of this Act the Commissioner has mailed to any person a notice under sudivision (a) of Section 274 of the Revenue Act of 1924 (whether in respect of a tax imposed by Title II of such act or in respect of so much of an income, war-profits, or excess profits tax imposed by any of the prior Acts enumerated in subdivision (a) of this section as was not assessed before June 3, 1924), and if the 60-day period referred to in such subdivision has not expired before the enactment of this Act and no appeal has been filed before the enactment of this Act, such person may file a petition with the Board in the same manner as if a notice of deficiency had been mailed after the enactment of this Act in respect of a deficiency in a tax imposed by this title. In such cases the 60-day period referred to in subdivision (a) of Section 274 of this Act

shall begin on the date of the enactment of this Act, and the powers, duties, rights, and privileges of the Commissioner and of the person entitled to file the petition, and the jurisdiction of the Board and of the courts, shall, whether or not the petition is filed, be determined, and the computation of the tax shall be made, in the same manner as provided in subdivision (a) of this section."

Respectfully,

C. R. NASH,
Assistant to the Commissioner.
By W. S. SHERWOOD,
Head of Division.

COPY

TREASURY DEPARTMENT
Office of
Commissioner of Internal Revenue
WASHINGTON

Income Tax Unit
IT:R:CC—

CERTIFICATE OF OVERASSESSMENT
Number: 821629

Bertelson and Petersen Engineering Co.,
256 Border Street,
East Boston, Massachusetts

Allowed: $1137.31
Schedule No. 13847

Sirs:

An audit of your income tax return, Form 1120, and a consideration of all the claims (if any) filed by you for the year 1920 indicates that the tax assessed for this year was in excess of the amount due:

Tax assessed:	
Original assessment, Account #406220	$2668.55
Tax assessable	1531.24
Tax overassessed	$1137.31

The overassessment indicated above results from adjustments made in the revenue agent's report, a copy of which has been furnished you. Small error in income shown on page 23 of the revenue agent's report has been corrected.

The amount of the overassessment will be abated, credited, or refunded as indicated below. (You will be relieved from the payment of any amount abated; if an overpayment has been made and other taxes are due, credit will be made accordingly, and any amount refundable is covered by a Treasury check transmitted herewith.)

Included in the accompanying check is interest in the amount stated below, allowed on the refund or credit.

Respectfully,
J. G. BRIGHT
Deputy Commissioner.

Instructions Executed By
(Signed) F. R. CLUTE,
Head of Division.

Signature
M. E. NICHOLS
Collector Int. Rev.
J.H.R.
..... District
of Mass.

Credited: $90.98, $182.76, $318.15, $398.22, $147.20
Year: 1913 Addl., 1914 Addl., 1915 Addl., 1916 Addl., 1919 Addl.
Acct. No. Mar. '25 P. 1 L.4-C, Mar '25 P. 1 L.8-C, Mar '25 P.1 L.5-C, Mar '25 P.1 L.6-C Mar '25 P. 1 L.7-C
Interest: $229.56

DEFENDANT'S ASSIGNMENT OF ERRORS.

[FILED FEBRUARY 18, 1937.]

COMES NOW the United States of America, defendant in the above-entitled cause, and files the following assignment of errors upon which it will rely in the prosecution of the appeal herewith petitioned for in said cause, from the judgment of this Court entered on the 30th day of November 1936:

I. That the Court erred in ordering judgment to be entered in favor of the plaintiff and against the defendant.

II. That the Court erred in refusing to grant defendant's motion for judgment filed at the close of the evidence.

III. That the Court erred in that the special findings of fact made and entered by the Court do not support the judgment entered pursuant to its order.

IV. That the Court erred in holding that the deficiency assessment of $34,555.68, made by the Commissioner of Internal Revenue against the plaintiff for the year 1918, was not made within the statutory period of limitation as extended by any waiver, or waivers, then on file with the Bureau of Internal Revenue.

V. That the Court erred by not holding that the plaintiff was estopped to deny that the waiver, executed by the plaintiff on December 10, 1925, and familiarly known as the "Fifth Waiver," was filed with the Bureau of Internal Revenue without its authority.

VI. That the Court erred by holding that the liability of the plaintiff for the deficiency assessment of $34,555.68 to the United States became extinguished.

VII. That the Court erred by assuming jurisdiction to try and determine the controversy between the plaintiff and the defendant herein.

WHEREFORE, defendant prays that the judgment heretofore rendered by the District Court herein be reversed and that the said cause be remanded to the District Court with instructions to enter judgment for the defendant, dismissing plaintiff's petition.

FRANCIS J. W. FORD,
United States Attorney, Attorney for the defendant.
By ARTHUR L. MURRAY,
Special Assistant to the United States Attorney.

A citation on appeal was issued on February 18, 1937, and was made returnable in the U. S. Circuit Court of Appeals for the First Circuit on March 19, 1937. Service of said citation was duly acknowledged on behalf of the plaintiff.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
DISTRICT OF MASSACHUSETTS, ss.:

I, JAMES S. ALLEN, Clerk of the District Court of the United States for the District of Massachusetts, do hereby certify that the foregoing is the transcript of the record on the appeal of the United States of America from the judgment entered November 30, 1936, on proceedings after Mandate, including true copies of such proofs, entries and papers on file as have been agreed upon in the cause entitled,

No. 4146, LAW DOCKET,

BERTELSEN & PETERSEN ENGINEERING CO.,
PLAINTIFF,

v.

UNITED STATES OF AMERICA,
DEFENDANT,

in said District Court determined.

And I further certify that transmitted herewith are the

originals of the petition for appeal and the citation on appeal with the acknowledgment of service thereon.

[SEAL]

In testimony whereof, I hereunto set my hand and affix the seal of said District Court, at Boston, in said District this sixth day of April, A. D. 1937.

JAMES S. ALLEN, *Clerk.*

[MEMORANDUM. An order of enlargement of time for docketing case to, and including, April 17, 1937, is here omitted. A. I. CHARRON, *Clerk.*]

PROCEEDINGS IN CIRCUIT COURT OF APPEALS

On February 15, 1938, this cause came on to be heard and was fully heard by the court, Honorable George H. Bingham, Honorable Scott Wilson, and Honorable James M. Morton, Jr., Circuit Judges, sitting.

Thereafter, to wit, on the eighteenth day of March, A. D. 1938, the following Opinion of the Court was filed:

United States Circuit Court of Appeals for the First Circuit

No. 3243. October Term, 1937

UNITED STATES OF AMERICA, DEFENDANT, APPELLANT

v.

BERTELSEN & PETERSEN ENGINEERING COMPANY, PLAINTIFF, APPELLEE

Appeal from the District Court of the United States for the District of Massachusetts

Before BINGHAM, WILSON, and MORTON, JJ.

Opinion of the court

March 18, 1938

WILSON, J.: This is an action by a taxpayer to recover the sum of $34,555.68 with interest as a part of an overpayment of $91,570.34 for income and excess profits taxes for the year 1917, which overpayment had been allowed by the Commissioner.

On July 27, 1926, the Commissioner assessed a deficiency tax against the plaintiff of $34,555.68 for the year 1918, and under Sec. 284 of the Revenue Act of 1926 credited against such deficiency assessment the above amount, being a part of the overpayment already allowed for the 1917 taxes. The plaintiff contends that the deficiency assessment made on July 27, 1926, was unauthorized and unlawful, and that it is entitled to recover the above sum, being a balance of the overpayment of the 1917 taxes, which had been allowed by the Commissioner. The case was heard by the District Court, a jury being waived.

While this case had previously been before this court on appeal and was remanded to the District Court for further proceedings in accordance with the opinion of this court, 60 Fed. (2d) 745, the question of the jurisdiction of the District Court is raised by the government for the first time in this court under its present assignment of errors.

We think there is no merit in the government's contention. Its contention is based on Sec. 24 (5) (20) of the Judicial Code as

amended. Sub-section (20) of Sec. 24 provides that District Courts have concurrent jurisdiction with the Court of Claims of all claims against the United States, where the amount in controversy is not in excess of $10,000; and also of any suit or proceeding commenced after the passage of the Revenue Act of 1921 for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or any sum alleged to have been excessive or in any manner wrongfully collected under the internal revenue laws in excess of $10,000, if the collector of internal revenue by whom such tax or sum was collected is dead, or was not in office as collector of internal revenue at the time such suit or proceeding was commenced. United States v. Piedmont Mfg. Co., 89 Fed. (2d) 296, 300; United States v. Reeves Bros. Co., 83 Fed. (2d) 121, 122.

It is admitted that the collector who collected the 1917 tax was, at the time of the filing of this petition in 1929, either dead or out of office. The government contends that this action is governed by Sec. 3226, R. S., but we think in the last analysis it is based on a claim for a balance of the overpayment for the 1917 tax and not for an illegal collection of a 1918 tax. The District Court so held. The government's contention on this point is without merit. United States v. Piedmont Mfg. Co., supra, p. 300.

The other assignments of error by the government raise the question of whether a "fifth waiver" filed with the Bureau in December, 1925, was effective to extend the time for assessing the 1918 tax to December 31, 1926; and whether the judgment is supported by the findings of fact by the District Court.

The District Court in its opinion under a heading, "Findings of Fact," found that four waivers previous to that of December 1925 had been filed with the Bureau, which extended the time for assessing the taxes for 1918 to February 27, 1926. Whether or not these findings can be considered special findings within the meaning of Sec. 700, R. S., no exception was taken thereto and no question of law is raised before this court as to the sufficiency of the evidence to support them.

Therefore, to sustain the validity of the deficiency tax which was assessed on July 27, 1926, the waiver filed in December 1925 must be held to be a valid waiver. Sec. 278 (c) of the Revenue Act of 1924 requires that both the taxpayer and the Commissioner consent in writing to any assessment of a tax after the period prescribed in Sec. 277 of the 1924 Act.

It is agreed that the fifth waiver filed in December 1925 was not signed by the Commissioner. While there is some difference in the decided cases as to whether the signature of the Commissioner is essential to the validity of a waiver, it has been so held in the case of Commissioner v. United States Ref. Corp., 64 Fed. (2d) 69, which was affirmed by an equally divided court in 290 U. S. 591; and again in the case of S. S. Pierce Company v. United States, it was decided by this court on December 8, 1927, that the signature of the Commissioner, in some form, assenting to a waiver by a taxpayer was essential to its validity.

In R. H. Stearns Co. v. United States, 291 U. S. 54, while it was ecognized that the assent of the Commissioner must be indicated n writing in some manner, it was held that his assent might be nferred from a notation on the official schedule of assessments signed y the Commissioner on which appeared a notation specifically refer- ing to and identifying the waiver in that case.

The District Court in its opinion under a heading "Conclusions" ound that there was no such notation in this case that could be ound to refer to the fifth waiver. This finding was clearly a general nding of fact, or a mixed question of law and fact to which no xception was taken by the government. The evidence on which it as based cannot be reviewed in this court. Fleischmann Co. v. nited States, 270 U. S. 349, 355–6.

No exceptions were taken to any rulings by the District Court uring the progress of the trial, except as to the admission of evi- ence, which are not included in the government's assignments of rror. Exceptions contained in a bill of exceptions filed long after he case is heard and judgment rendered do not relate back to the rial. Fleischmann Co. v. United States, supra; United States v. mith, 39 Fed. (2d) 851, 854; Arthur C. Harvey Co. v. Malley, 60 ed. (2d) 97, affirmed 288 U. S. 415.

In Fleischmann Co. v. United States, supra, the court said:

"It is settled by repeated decisions, that in the absence of special ndings, the general finding of the court is conclusive upon all mat- rs of fact and prevents any inquiry into the conclusions of law mbodied therein, except in so far as the rulings during the progress f the trial were excepted to and duly preserved by bill of exceptions, s required by the statute. [Citing cases.] To obtain a review by n appellate court of the conclusions of law a party must either ob- ain from the trial court special findings which raise the legal propo- itions, or present the propositions of law to the court and obtain a uling on them. • • • That is, he should request special findings f fact by the court, framed like a special verdict of a jury, and then eserve his exceptions to those special findings, if he deems them not o be sustained by any evidence; and if he wishes to except to the onclusions of law drawn by the court from the facts found he should ave them separately stated and excepted to. In this way, and in this ay only, is it possible for him to review completely the action of he court below upon the merits'."

An examination of the record and the opinion of the District ourt clearly discloses that the findings of fact contained in its pinion, whether intended as special findings of fact under Sec. 700 . S., are not findings of all the ultimate facts from which the judg- ent can be said to follow as a matter of law; therefore an exception o the denial of a motion for judgment would raise no question of law n this court. Wilson v. Merchants' Loan & Trust Co. of Chicago, 3 U. S. 121, 126, 127.

The motion of the defendant that a judgment for the plaintiff, if ndered, should not exceed $44.07, cannot be sustained as a motion for

a judgment for the defendant. There was no evidence before the District Court at the second hearing on which such a judgment could be found. Therefore an exception taken to the denial thereof raises no question of law for this court.

The motion was evidently based on the finding of the District Court at the prior trial that an error had been made in the computation of interest. At the second trial it was stipulated, if judgment was found for the plaintiff for the amount sued for, how the interest should be computed.

Except on the issue of jurisdiction of the subject matter, which is always open and may be raised at any state of the proceedings, the defendant has failed to take the proper steps in this case to raise questions of law before this court. Fleischmann Co. v. United States, supra, p. 356.

The judgment of the District Court is affirmed.

On the same date, to wit, March 18, 1938, the following Judgment was entered:

Judgment

March 18, 1938

This cause came on to be heard February 15, 1938, upon the transcript of record of the District Court of the United States for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, it is now, to wit, March 18, 1938, here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court,

ARTHUR I. CHARRON, *Clerk.*

Thereafter, to wit, on the first day of April, A. D. 1938, the following petition for rehearing was filed:

United States Circuit Court of Appeals for the First Circuit

No. 3243. October Term, 1937

UNITED STATES OF AMERICA, DEFENDANT, APPELLANT

v.

BERTHELSEN & PETERSEN ENGINEERING COMPANY, PLAINTIFF, APPELLEE

On Appeal from the District Court of the United States for the District of Massachusetts

Petition for rehearing

To the Honorable United States Circuit Court of Appeals for the First Circuit, and the Judges thereof:

Now comes the United States of America, the appellant in the above-entitled cause, wherein this Court, on March 18, 1938, rendered

its opinion holding adversely to the appellant and affirmed the decision of the District Court of the United States for the District of Massachusetts, and, by its attorneys, presents this petition for rehearing.

This petition is not being filed as additional argument upon a contention heretofore specifically presented by the Government. During the hearing before this Court the matter of jurisdiction unexpectedly turned to the reliance by the taxpayer upon an account stated as the basis for its claim. The point made herein is that, if the suit is upon an account stated, then the Court of Claims unquestionably would have had sole jurisdiction.

In support hereof the appellant respectfully shows to this Honorable Court the following:

When this cause was before this Court on the former appeal (60 F. (2d) 745), it was considered by the Court as a case involving an illegal collection for the year 1918. In the second decision, the Court held that the action was for the recovery of the withheld allowed overpayment for the year 1917, "and not for an illegal collection of a 1918 tax." As an action for the withheld part of the allowed overpayment for 1917, the action (as discussed on page 20 of appellant's brief) was originally predicated upon a claim for refund filed November 28, 1927, which was not timely filed; and, therefore, the action was not brought within five years from the date of the payment of the tax or within two years after the final action of the Commissioner upon any valid claim for a refund. However, the Court decided that Section 3226 of the Revised Statutes can have no application when the taxpayer sues on an allowed claim, which is tantamount to holding that when the Commissioner allowed the claim, the withheld portion of the allowed claim ceased to be an internal revenue tax erroneously or illegally assessed. But subsection 20 of Section 24 of the Judicial Code does not give a district court concurrent jurisdiction with the Court of Claims when the amount is over $10,000, unless the suit is for the recovery of an internal revenue tax alleged to have been erroneously or illegally assessed or collected.

The appellee, in its contention that its suit was not for the overpayment of a tax but was based upon a certificate of overassessment, and for that reason Section 3226 of the Revised Statutes did not apply, cited no authority therefor except the following four cases which originated in the Court of Claims of the United States (Br. 25):

Kaufman v. United States, 96 U. S. 567.

United States v. Real Estate Savings Bank, 104 U. S. 728.

Bonwit Teller & Co. v. United States, 283 U. S. 258.

Parks & Woolson Machine Co. v. United States, 58 F. (2d) 868; certiorari denied, 53 S. Ct. 85.

In Kaufman v. United States, supra, it was merely held that the Court of Claims had jurisdiction of an action to recover an unpaid allowance made by the Commissioner. In United States v. Real Estate Savings Bank, supra, the Supreme Court of the United States, upon

holding that the Court of Claims had jurisdiction of a claim allowed by the Commissioner, said (p. 734):

"A rejected claim may be prosecuted against collector, and an allowed claim, not paid, may be sued for in the Court of Claims."

While that case was decided prior to the amendment of Section 24 of the Judicial Code, there is nothing in the amendment that affects the application of the Real Estate Savings Bank case to the instant case. In Bonwit Teller & Co. v. United States, supra, the taxpayer pleaded its claim in two forms: The first was based upon the Commissioner's certificate of overassessment; the other on an account stated. The Supreme Court held that, upon the delivery of the certificate to the plaintiff, there arose the cause of action upon which the suit was brought and the suit was not barred; but, as stated before, this suit arose in the Court of Claims. In Parks & Woolson Machine Co. v. United States, supra, the Court of Claims held that the issuance of a certificate of overassessment created an account stated in favor of the plaintiff and against the United States.

The appellee commenced and pursued its alleged right to collect $34,555.68 in an alternative fashion; that is to say, as a wrongfully withheld portion of an allowed overpayment for 1917, or as an illegal collection for 1918. In each contention it relied upon the rejection of a claim for refund; and not until the hearing upon this appeal did the appellee contend that its right to recover was in the nature of an action on an account stated. Nevertheless, its reliance now upon the Commissioner's certificate of overassessment is only the more indicative that it should have gone into the Court of Claims instead of into a district court of the United States to present its case against the Government.

We know of no decided case where the right to recover more than $10,000 against the United States on an account stated, or a certificate of overassessment, was allowed by a district court.

In United States v. Tacoma Oriental S. S. Co., 86 F. (2d) 363 (C. C. A. 9th), the action was brought to compel the United States to pay past and future earnings, amounting to more than $10,000, arising under a mail contract. In holding that the district court did not have jurisdiction against the United States when the amount was over $10,000, the appellate court said (p. 369):

"Appellants [United States] have assigned as error the denial of the special appearance filed by the United States. They argue that actions, against the United States, based upon contracts, may be brought in either the District Courts or the Court of Claims, where the amount involved does not exceed $10,000." 28 U. S. C. A. Sec. 41 (20); 28 U. S. C. A. Sec. 250. But if the amount involved in such actions exceeds $10,000, then the Court of Claims has exclusive jurisdiction. 28 U. S. C. A. Sec. 250.

"Appellee's petition, as against the United States, asked that the latter pay to the appellee the amount due it. The petition, therefore, would be based on contract, and inasmuch as the amount involved exceeds $10,000, could be brought only in the Court of Claims. * * *"

Since this Court decided that the instant case is an action upon a certificate of overassessment, and therefore an action based upon a promise, express or implied, to pay an allowed refund, this case, under the theory of the decision, is comparable to United States v. Tacoma Oriental S. S. Co., supra.

In Gans Steamship Line v. United States, decided November 16, 1932, not officially reported, but may be found in 1932 C. C. H. vol. 3, par. 9523, the District Court of the United States for the Southern District of New York held, in a memorandum opinion, that a suit against the United States for the recovery of more than $10,000 on a certificate of overassessment was a suit based upon a promise to pay an allowed refund and was not within the amendment to the "Tucker Act" giving a district court jurisdiction of suits to recover "any internal revenue tax alleged to have been erroneously or illegally assessed or collected." The decision of the District Court was affirmed by a per curiam opinion of the Circuit Court of Appeals for the Second Circuit, 65 F. (2d) 1016, and certiorari was denied by the Supreme Court of the United States, 290 U. S. 657. The unpublished opinion of the District Court is as follows:

"Coxe, District Judge: This is a suit against the United States for $216,469.05 on a certificate of over-assessment, dated Oct. 28, 1925, relating to 1917 taxes. It is, therefore, based on 'an implied promise to pay the allowed refund.' (Moses v. U. S., decided by the C. C. A. 2d circuit, Nov. 14, 1932; U. S. v. Savings Bank, 104 U. S. 728; Bonwit Teller v. U. S., 283 U. S. 258). The suit is not one for the recovery of taxes 'erroneously or illegally assessed or collected,' which could have been maintained against the Collector while in office; Cary v. Curtis, 3 How. 236; dissenting opinion of Mr. Justice Story; Smietanka v. Indiana, 257 U. S. 1; International v. Burrill, 260 Fed. 664; and it, therefore, is not within the amendment to the Tucker act giving the District Court jurisdiction of suits to recover 'any internal-revenue tax alleged to have been erroneously or illegally assessed or collected * * * even if the claim exceeds $10,000, if the collector of internal revenue by whom such tax, penalty, or sum was collected is dead, or is not in office as collector of internal revenue at the time such suit or proceeding is commenced.'" (42 Stat. 311; 43 Stat. 972; Schwab v. U. S., 17 Fed. (2) 34; Smietanka v. Indiana (supra); Moses v. U. S. (supra). Inasmuch as the present suit is for more than $10,000, it cannot be maintained in the District Court.

The Government's motion to dismiss for lack of jurisdiction is, therefore, granted.

In First National Bank v. United States, 2 Fed. Supp. 107 (E. D. Mo.), one of the questions involved was whether a district court has jurisdiction in an action against the United States on a certificate of overassessment exceeding $10,000. In discussing the question of jurisdiction the court said (p. 109):

"Second, I am very doubtful whether I have jurisdiction to enforce an account stated, in a case wherein more than the sum of $10,000 is involved. Resort, in such cases, seems uniformly to have been had

to the Court of Claims, which I think would have jurisdiction. While this court has jurisdiction in matters of actions to compel refund of taxes unjustly and unlawfully exacted and collected, yet, when the fact of illegal exaction and collection and the right to a refund, with the amount thereof, are agreed to between the United States and the taxpayer, an account stated arises, and suit upon it can, in my opinion, be maintained (when the amount claimed exceeds $10,000) only in the Court of Claims."

In Otis Elevator Co. v. United States, 18 Fed. Supp. 87 (S. D. N. Y.), the action, which was against the United States for more than $10,000, arose on a pleading setting forth that by a certificate of overassessment the Commissioner of Internal Revenue stated an account relative to income tax payments that showed a balance in favor of the petitioner. The court, in holding that it did not have jurisdiction, said (p. 88):

"(1) The District Court has no jurisdiction under the Tucker Act to hear a case against the United States on account stated where the amount involved exceeds $10,000. Such a suit is plainly outside of the general scope of the act, because it involves more than $10,000. It is also outside of the amendment of November 23, 1921, permitting the maintenance of suit exceeding $10,000 where the claim is for recovery of internal revenue tax and where the collector collecting the tax is dead or out of office; this because that amendment embraces only cases that might have been brought against the collector if still in office, and a suit on account stated could not have been brought against the collector." These propositions were settled by Moses v. United States, 61 F. (2d) 791 (C. C. A. 2), certiorari denied, 289 U. S. 743, 53 S. Ct. 689, 77 L. Ed. 1490.

In Moses v. United States, 61 F. (2d) 791 (C. C. A. 2d), an overassessment was determined and allowed for 1916. Later the Commissioner caused to be paid to the taxpayer $28,872.23, and credited the balance of $32,516.36 for the year 1915. Several years later, the taxpayer commenced an action in the district court for the recovery of the $32,516.36 on the theory that the assessment of the additional tax for 1915 was barred by the statute of limitations. The court held that unless the suit was one that could be brought against a collector, it was not within the jurisdiction conferred on district courts by the amendment (Sec. 24 (20) of the Judicial Code), which allowed suits to be brought against the United States, when the collector is dead or out of office, in the district courts for the recovery of any internal revenue tax alleged to have been erroneously collected. Part of the opinion is as follows (p. 793):

"Accepting the appellants' theory of their suit, the cause of action is grounded upon the Commissioner's determination evidenced by his certificate of overassessment. Bonwit Teller & Co. v. United States, 283 U. S. 258, * * *. The liability of the United States rests upon an implied promise to pay the allowed refund. United States v. Real Estate Savings Bank, 104 U. S. 728 * * *. United States v. Kaufman, 96 U. S. 567 * * *. But no such cause of action

can arise against a collector. He can neither allow a refund nor draw money from the Treasury to pay it. Hence no suit will lie against him based on the allowance of a refund." [Citing and quoting from Arthur C. Harvey Co. v. Malley, 60 F. (2d) 97 (C. C. A. 1st).]

* * * * * * *

"In the case at bar, the plaintiffs proved facts which created a contractual obligation on the part of the United States to pay over the allowed refund, and a breach of that obligation by retention of $52,000 for an unjustifiable reason; i. e., the illegally assessed additional tax for 1915. They urge that, regardless of the legal theory upon which their suit is based, it is a suit for a 'tax alleged to have been erroneously or illegally assessed or collected,' and so within the letter of the amendment expanding the District Court's jurisdiction. But the theory of the suit determines whether it is one which would lie against a collector if he were alive and in office; and, if it be not such a suit, then, for reasons already stated, we are satisfied that the amendment does not cover it. * * *"

To the same effect, see Lowe Bros. Co. v. United States, 92 F. (2d) 905 (C. C. A. 6th) pending on certiorari. Semble (p. 347), United States v. Elgin Nat. Watch Co., 65 F. (2d) 344 (C. C. A. 7th).

The only cases cited by this Court as bearing upon the jurisdictional question are United States v. Piedmont Mfg. Co., 89 F. (2d) 296 (C. C. A. 4th), and United States v. Reeves Bros. Co., 83 F. (2d) 121 (C. C. A. 6th). The Piedmont Mfg. Co. case was brought and decided on the theory of an illegal collection of taxes, part of which was paid by credits from other years, and involved a statute (Sec. 284 (c) of the Revenue Act of 1926, 44 Stat. 9, 66) making an exception respecting a claim for a refund where the Commissioner decreased invested capital of the taxpayer due to his failure to take adequate deductions in prior years. The Piedmont case did not involve an account stated. The Reeves Bros. Co. case was also brought in a district court of the United States for an illegal collection of a tax, and the United States Circuit Court of Appeals for the Sixth Circuit held that, since the amount involved was more than $10,000, the District Court did not have jurisdiction.

Whether the instant case was decided upon the theory of an account stated as commonly understood, or on an implied promise to pay the balance of the allowed refund evidenced by the certificate of overassessment for the year 1917, under neither theory can it be said that the suit is one for the recovery of taxes "erroneously or illegally assessed or collected"; and since the amount involved is over $10,000, only the Court of Claims would have had jurisdiction of the controversy. We know of no case other than the instant one where the contrary ever has been held.

Wherefore, in view of the foregoing, the appellant respectfully requests that its petition for rehearing be granted by this Honorable Court.

In view of the importance of the question here presented, it is respectfully requested that this Court, in the event of denial of this petition, give its reasons therefor.

Respectfully submitted.

JAMES W. MORRIS,
Assistant Attorney General.
SEWALL KEY,
J. LOUIS MONARCH,
L. W. POST,
F. A. MICHELS,
Special Assistants to the Attorney General.
FRANCIS J. W. FORD,
United States Attorney,
By ARTHUR L. MURRAY,
Special Assistant to the United States Attorney.

Certificate of counsel

The United States of America, appellant herein, by its attorneys, hereby certifies that the foregoing petition for rehearing is not presented for the purpose of delay or vexation, but is, in the opinion of counsel, well founded in law and proper to be filed herein.

FRANCIS J. W. FORD,
United States Attorney.
By ARTHUR L. MURRAY,
Special Assistant to the United States Attorney.

Thereafter, to wit, on April 14, 1938, the following Order of Court was entered:

Order of court

April 14, 1938

The petition for rehearing is granted only on the question of jurisdiction.

By the Court.

ARTHUR I. CHARRON, *Clerk.*

Thereafter, to wit, on June 24, 1938, this cause came on to be heard upon rehearing and was fully heard by the court, Honorable George H. Bingham, Honorable Scott Wilson, and Honorable James M. Morton, Jr., Circuit Judges, sitting.

Thereafter, to wit, on the thirteenth day of July A. D. 1938, the following Opinion of the Court on Rehearing was filed:

United States Circuit Court of Appeals for the First Circuit

No. 3243. October Term, 1937

UNITED STATES OF AMERICA, DEFENDANT, APPELLANT

v.

BERTELSEN & PETERSEN ENGINEERING COMPANY, PLAINTIFF, APPELLEE

Appeal from the District Court of the United States for the District of Massachusetts

Before BINGHAM, WILSON, and MORTON, JJ.

Opinion of the court on rehearing

July 13, 1938

WILSON, J.: This is a petition for a rehearing in the above entitled cause. The case was heard a second time by this court on appeal from the District Court of Massachusetts, and the judgment of the District Court was affirmed.

The issues raised on this appeal by the assignments of error were whether a deficiency assessment of $34,555.68 made by the Commissioner of Internal Revenue for the year 1918 was made within the statutory period of limitation, as extended by certain waivers filed by the taxpayer. The government also for the first time raised the question in its assignments of error as to whether the District Court had jurisdiction of the cause, relying on Sec. 24 (5) (20) of the Judicial Code as amended.

This court held that a fifth waiver filed in December 1925, which purported to extend the time for the assessment of the 1918 tax to December 31, 1926, was ineffective, since it was not assented to by the Commissioner in writing, and that the assessment of the deficiency tax for 1918 on July 27, 1926, was therefore void.

The petition for rehearing was granted on the sole question of whether the District Court had jurisdiction to hear and decide the case.

Some confusion has arisen in the consideration of the case as to whether the taxpayer's petition was grounded on the Commissioner's certificate of overassessment in 1917 as an account stated, or on a balance due on an allowed claim. In either case it is urged by the government that the Court of Claims has sole jurisdiction of the cause. Since this is a petition for rehearing, the case is to be heard anew on the question to which the rehearing is limited. If counsel for plaintiff in their brief, or this Court in its opinion, used language which may be construed as indicating that the taxpayer's petition was based solely on the Commissioner's certificate of overpayment of the 1917 tax, either as an account stated or as an allowed claim, we think, on rehearing on the question of the jurisdiction of the District Court to hear

and determine the case, that the facts on which jurisdiction is based are opened for further consideration.

The certificate of overassessment issued by the Commissioner on July 27, 1926, disclosed an overpayment by the taxpayer of the 1917 tax of $91,570.34, of which the Commissioner ordered refunded to the taxpayer approximately $55,000, and on July 27, 1926, credited $34,555.68 to a deficiency tax for 1918.

It cannot be said that the certificate of overassessment constituted an account stated between the government and the taxpayer, since the taxpayer refused to assent to the application of any part of the overpayment to a deficiency tax for 1918. To constitute an account stated there must be an agreement as to liability and the amount due. Goodrich, Admr. v. Coffin, 83 Me. 324. That the taxpayer's petition was not based on an allowance of an overpayment for 1917, and an implied promise by the government to refund, is equally clear, since the taxpayer refused to assent to the application of $34,555.68 to a deficiency tax of 1918. The application by the Commissioner on July 27, 1926, of a part of the overpayment for 1917 to a deficiency tax for 1918, against the protest of the taxpayer, constituted a disallowance of so much of the petitioner's original claim for refund.

On November 25, 1927, the taxpayer wrote the Commissioner that, inasmuch as its original claim for refund for 1917 as to the part now sued for had been rejected within two years, it was filing a refund claim for that part of the 1917 overpayment erroneously applied to a deficiency tax for 1918 as a protective measure; and on November 28, 1927, the taxpayer renewed its claim for a refund of $34,555.68 as an overpayment of its 1917 tax by filing with the Commissioner of Internal Revenue a specific claim for the amount under Sec. 3226 R. S. as amended by Sec. 1113 of the Revenue Act of 1926, to which claim the suit of the taxpayer relates, the receipt of which claim was acknowledged by the Commissioner.

On February 6, 1928, the Commissioner of Internal Revenue notified the taxpayer by letter that its claim of November 28, 1927, had been examined and would be rejected, which rejection would appear on the next schedule approved by the Commissioner.

The chairman of the Special Advisory Committee of the Bureau of Internal Revenue in a memorandum furnished the taxpayer stated relative to its alternative claims for 1917 and 1918 filed November 28, 1927, that: "The claims were considered on the merits and in a Bureau letter dated February 6, 1928, they were proposed for rejection." They were officially rejected on February 28, 1928.

Within two years from the final disallowance of said claims on February 28, 1928, the taxpayer on September 19, 1929, filed a petition in the District Court for the District of Massachusetts to recover the sum of $34,555.68 with interest, which it alleged had been erroneously disallowed.

In the case of Jones v. United States, 5 Fed. Supp. 146, 152, the Court of Claims held:

"That a reconsideration of a refund claim on the merits constitutes a reopening of the claim is no longer open to doubt. Mobile Drug Co. v. United States (D. C.), 39 F. (2d) 940, and McKesson & Robbins, Inc. v. Edwards (C. C. A.), 57 F. (2d) 147. These cases announce the rule that when the Commissioner, upon application made by a taxpayer within the time in which suit could be instituted on a disallowed claim, enters into a reconsideration of the merits of the claim and later makes a decision thereon rejecting the claim, or adheres to his former decision rejecting it, his decision for the purpose of the statute of limitations is in abeyance until he has reached and announced his final decision, and the taxpayer, under section 3226 of the Revised Statutes, as amended (26 U. S. C. A., Sec. 156), has two years thereafter in which to institute suit. * * * There must be an actual reconsideration of the case, and the final decision must be upon the merits of the claim. Ford Motor Co. v. United States (Ct. Cl.), 3 F. Supp. 423; Hickman v. United States (D. C.), 47 F. (2d) 328. We think this case clearly illustrates what constitutes the reconsideration of a claim for refund. It meets in every respect the requirement that the claim must be reconsidered and decided upon its merits."

In the case of Southwestern Oil & Gas Company v. United States, 29 Fed (2d) 404, 406, certiorari denied 280 U. S. 601, the Court said:

"The plaintiff * * * further contends that the date of the Commissioner's final rejection of its claim was not April 28, 1925, but August 31, 1927, as the Commissioner, pursuant to plaintiff's request made prior to the expiration of two years following the original rejection, had reopened the judgment and reconsidered the claim. We find that the last of these contentions to be sustained by the findings of fact, and that the claim was actually reopened and reconsidered, and finally decided on August 31, 1927, and consequently plaintiff's action is not barred by section 3226, R. S., as re-enacted by section 1113 of the Revenue Act of 1926, and section 281 (a) and (b) of the Revenue Act of 1924. * * *"

In Pacific Mills v. Nichols, 72 Fed. (2d) 103, 107, the Court said:

"In the present case, even if the Commissioner should be held to have decided every claim under the taxpayer's original petition, on March 26, 1927, when the second claim was filed, two years had not elapsed since the rejection of the first claim; it was still open to the plaintiff to sue on the denial of the first claim and to the Commissioner to reconsider his decision on the first claim and permit it to be amended and reheard."

Also see Pratt & Whitney Co. v. United States, 6 Fed. Supp. 574; United States v. Memphis Cotton Oil Co., 288 U. S. 62, 66.

The government having admitted all the jurisdictional facts except those authorizing the District Court to hear such a case, the facts appearing in the record demonstrate that the suit was one which could have been brought against a Collector, if living, but who is now dead or out of office.

We think the contention of the taxpayer must be sustained, viz: that the filing of the second claim for refund on November 28, 1927,

and its consideration on its merits was a reopening of the original claim of refund which had been timely filed under Sec. 3226 R. S. (amended by Sec. 1113 of the 1926 Revenue Act); Jones v. United States, supra, p. 132; Southwestern Oil & Gas Company v. United States, supra, p. 406; that the Commissioner accepted the claim as such without any objection as to its timeliness or form and considered it on its merits and officially denied it on February 28, 1938, and the suit of the taxpayer was filed within two years, or on September 19, 1929.

The case of Lowe Bros. v. United States, 92 Fed. (2d) 905, affirmed by the Supreme Court on May 16, 1938, does not militate against the taxpayer's right of recovery in this case, since the tax for the year in question in that case was not collected by a collector who was dead or out of office, as the 1917 tax had been in this case, but was in effect collected by the Commissioner of Internal Revenue by applying an overpayment as a credit on taxes for a prior year, which the Commissioner attempted to do in this case for an alleged deficiency tax for 1918.

Upon a reconsideration of the facts and the briefs on rehearing, we think this action was brought to recover that part of a claim for refund of the 1917 overpayment which had been disallowed by improperly applying it to an invalid assessment of a deficiency tax for 1918.

On rehearing the judgment of the District Court will stand affirmed.

On the same day, to wit, July 13, 1938, the following Order of Court was entered:

Order of court

July 13, 1938

On rehearing the judgment of the District Court will stand affirmed.

By the Court.

ARTHUR I. CHARRON, *Clerk.*

Thereafter, to wit, on the thirteenth day of August A. D. 1938, mandate issued to the District Court.

Clerk's certificate

I, Arthur I. Charron, Clerk of the United States Circuit Court of Appeals for the First Circuit, certify that the foregoing pages numbered 1 to 90, inclusive, contain and are a true copy of the record and all proceedings to and including October 7, 1938, in the cause in said court numbered and entitled, No. 3243, United States of America, Defendant, Appellant, v. Bertelsen & Petersen Engineering Company, Plaintiff, Appellee.

In testimony whereof, I hereunto set my hand and affix the seal of said United States Circuit Court of Appeals for the First Circuit, at Boston, in said First Circuit, this seventh day of October A. D. 1938.

[SEAL] ARTHUR I. CHANDON, *Clerk.*

Supreme Court of the United States

Order allowing certiorari

Filed November 21, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice REED took no part in the consideration and decision of this application.